85-1551

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et als.*,

Appellants,

v.

JEFFREY MAY, individually, *et als.*,

Appellees.

On Appeal from the United States Court of Appeals For the Third Circuit

JURISDICTIONAL STATEMENT

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Questions Presented

1. Whether a state statute which permits public school students, before the opening exercises of each school day, to observe a one minute period of silence to be used solely at the discretion of the individual student for quiet and private contemplation or introspection violates the establishment clause of the first amendment.

2. Whether in this first amendment establishment clause case the court of appeals erred, as a matter of law, by failing to engage in plenary review of the district court's findings under this Court's ruling in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984).

Parties to the Proceeding

Appellants: In addition to Alan J. Karcher, the appellants herein (defendants-intervenors-appellants in the court of appeals) are the New Jersey General Assembly, Carmen A. Orechio, as President of the New Jersey Senate, and the New Jersey Senate (hereinafter the "Legislature").

Saul Cooperman, the Commissioner of the New Jersey Department of Education, the New Jersey Department of Education, the Edison Township Board of Education and the Old Bridge Township Board of Education were all named as defendants in the original complaint, but took no active role in the proceedings before either the district court or court of appeals.

Appellees: In addition to Jeffrey May, individually, Jean Ross, as natural parent of Damon Ross, an infant, and Jean Ross, individually; Bonnie Schorske, as natural parent of Mark Tulloss, an infant, and Bonnie Schorske, individually; Brenda Butler, individually, and Gary Drew, individually, were appellees in the court of appeals.

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Other Authorities Cited

J. Choper, Religion in the Public Schools; A Proposed Constitutional Standard, 47 Minn. L. Rev. 329 (1963) 19

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P. Freund, Religion and the Public Schools: The Legal Issue, at 23 (1965) 19

P. Kauper, Prayer, Public Schools and the Supreme Court, 61 Mich. L. Rev. 1031 (1963) 19

L. Tribe, American Constitutional Law §14-6 (1978) 19

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On Appeal from the United States Court of Appeals For the Third Circuit

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 24, 1985, affirming the decision of the district court and declaring unconstitutional, under the establishment clause of the first amendment, N.J.S.A. 18A:36-4. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The majority and dissenting opinions of a panel of the United States Court of Appeals for the Third Circuit dated December 24, 1985 are reported at 780 F. 2d 240 (3rd Cir. 1985). (App. A 1a-61a).[1] The opinion of the United States District Court for the District of New Jersey dated October 24, 1983 is reported at 572 F. Supp 1561 (D.N.J. 1983). (App. B 62a-100a).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 24, 1985. (App. D 103a). The jurisdiction of the Supreme Court of the United States to review the decision by direct appeal is conferred by 28 U.S.C. §1254(2).

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[1]Reference herein to the opinions and judgments below will be by citation to the Appendix of this Jurisdictional Statement.

Statute and Constitutional Provisions Involved

Title 18A, New Jersey Statutes Annotated, Chapter 36-4 (West 1982), commonly referred to as the Moment of Silence Statute (hereinafter the "MOS"), provides that:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

The First Amendment to the United States Constitution (in pertinent part):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Fourteenth Amendment to the United States Constitution (in pertinent part):

> Section 1.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

A. Facts

The MOS was originally introduced in the New Jersey Assembly in March of 1982 as Assembly Bill 1064 by 55 sponsoring assembly persons. (App. F 110a). Initially, the Bill passed both the Assembly and the Senate and was forwarded to Governor Thomas Kean for signature. Governor Kean vetoed the Bill and returned it to the Assembly. On December 13, 1982, the Assembly voted to override the Governor's veto by a vote of 57 to 17, and on December 16, 1982, the Senate voted to override the veto by a vote of 27 to 8. The MOS became law immediately.

Aside from its text, the only published official statements by the Legislature regarding the MOS were contained in its preamble and in an official statement which accompanied the Bill when it was voted into law. Those statements provided respectively as follows:

> An Act to allow students of public schools to participate in a 1 minute period of silence before the opening of each school day and supplementing chapter 36 of Title 18A of the New Jersey Statutes.
>
> * * *
>
> This Bill allows each student to participate in a 1 minute period of voluntary silence to be used solely at the discretion of the individual student.

(App. F 110a).

Immediately after its enactment, the MOS was communicated to all school districts by the New Jersey Department of Education without administrative guidelines or comment. The MOS was implemented in some school districts prior to the 1982 Christmas recess and reaction to its enact-

ment and implementation by some students, parents and a teacher precipitated the filing of the instant lawsuit.

On January 10, 1983, plaintiffs-appellees (hereinafter the "plaintiffs"), parents, students and a teacher, brought suit against the Commissioner of the Department of Education, the New Jersey Department of Education, the Edison Township Board of Education, and the Old Bridge Township Board of Education, pursuant to the provisions of 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202, seeking declaratory and injunctive relief voiding as unconstitutional and preliminarily and permanently enjoining implementation of the provisions of the MOS. The plaintiffs alleged that the MOS violated the establishment clause of the first amendment; violated the due process provisions of the fourteenth amendment; was void on its face; and violated provisions of the New Jersey Constitution.[2]

With the filing of the complaint, plaintiffs moved for a temporary restraining order supported, *inter alia*, by plaintiffs' affidavits, a brief and an appendix of exhibits which included copies of previously considered legislation dating back to 1970 and selected newspaper articles purporting to report statements of various legislators, editors, and citizens with regard to both the MOS and prior bills, and the affidavit of Reverend Dudley E. Sarfaty setting forth his recollection of remarks he overheard during legislative debates prior to the Legislature's override votes of the Governor's veto. While the district court initially found the MOS both neutral on its face and not by its terms mandating prayer, the court nonetheless entered a

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[2] At trial, plaintiffs presented no evidence regarding alleged violations of the New Jersey Constitution and neither the district court nor the court of appeals addressed this particular claim in their respective opinions. The claim is therefore deemed abandoned.

temporary restraining order after an examination of the materials plaintiffs had submitted, which the court concluded revealed an improper legislative intent in enacting the MOS.

On January 18, 1983, in recognition of the fact that no named parties would actively oppose plaintiffs' suit, the district court permitted the intervention of Alan J. Karcher, in his representative capacity as the Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio, in his representative capacity as President of the New Jeresy Senate; and the New Jersey Senate. Thereafter, the temporary restraints were continued by consent of the parties pending a hearing on the merits.

B. Decision of the district court.

Trial on the merits commenced on September 13, 1983. Plaintiffs presented live testimony from thirteen witnesses, by stipulation introduced the previously filed affidavits of the plaintiffs and, over the continuing objections of the Legislature, introduced a multitude of documents containing copies of bills previously considered by prior independent New Jersey legislatures dating back to 1970, newspaper articles containing statements of a handful of legislators, editorials, citizens' letters, photographs and news reports of the MOS' implementation. The plaintiffs' proofs consisted of predictions as to how the MOS might be used by teachers and students for religious purposes; what had allegedly been said by *some* legislators both during and outside legislative debates; the opposition positions of three educator associations; parent and student reactions to the law; the reaction of a teacher; and opinions as to the law's lack of educational utility. Two students described how the MOS had been implemented in their classrooms.

The Legislature produced testimony from five witnesses. The Legislature's proofs consisted of a psychologist who reported the results of his research project to determine the objective effect of a moment of silence exercise in actual operation; two Sayreville, New Jersey school teachers who described the operation of a moment of silence exercise in their school district for over 10 years; a professor of sociology and education who described the pedagogical utility of a moment of silence to create a transition between non-school and school; and a professor of journalism who testified regarding the inability to accurately determine public perception or reliably predict public reaction from examination of the news articles presented by the plaintiffs. The Legislature also presented a videotape of a December 17, 1982 WCBS-T.V. (New York) news report concerning the Sayreville practice described by the two teachers.

Based on findings of fact and conclusions of law embodied in an opinion filed on October 24, 1983 and reported at 572 F. Supp. 1561 (D.N.J. 1983), (App. B 62a-100a), the district court issued a decision granting plaintiffs' application for an order permanently enjoining the implementation of the MOS and declaring it unconstitutional on its face and as applied.[3]

C. Decision of the court of appeals.

Following briefing, the court of appeals (panel composed of Circuit Judges John Gibbons and Edward Becker and District Judge Marvin Katz, sitting by designation) heard

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[3] Despite its opinion, the order entered by the court failed to provide for a permanent injunction against implementation of the MOS, but instead merely declared the MOS unconstitutional. (App. C 101a).

oral argument on October 26, 1984. In June of 1985, the panel requested that the parties submit supplemental letter briefs commenting upon the effect, if any, that this Court's intervening decision in *Wallace* v. *Jaffree,* 105 S. Ct. 2479 (1985) had upon the issues then pending before the panel. After receipt of the parties' respective submissions, the panel heard reargument on August 13, 1985.

On December 24, 1985, a divided panel affirmed the district court's conclusion that the MOS was unconstitutional. Judge Gibbons, writing for the majority, sustained the district court's conclusion on a narrower ground, and by a markedly different analysis, than that employed by the district court. In the process, the majority opinion rejected the district court's analysis under both the "effect" and "entanglement" prongs, (App. A 16a-22a) and rested its decision solely on its interpretation of this Court's test under the "purpose" prong. (App. A 23a -30a).

Circuit Judge Becker, in a dissenting opinion, sharply broke with the majority over its interpretation of this Court's "purpose" test and concluded that the MOS was constitutional. (App. A 31a-61a). Judge Becker further disagreed with the majority analysis on the grounds that in reaching its conclusion that the MOS lacked a secular purpose, the majority had (1) either applied the incorrect standard of review in contravention to this Court's decision in *Bose Corp.* v. *Consumers Union,* 466 U.S. 485 (1984) (App. A 44a-47a) or (2) even assuming a more deferential standard of review was applicable under Fed. R. Civ. P. 52(a), the majority had inexplicably ignored sufficient relevant evidence in the record which revealed that the district court had clearly erred in finding that the MOS had no secular purpose. (App. A 58a- 60a).

The Questions Presented are Substantial

This case presents two substantial questions for decision by this Court. One question is of exceptional importance in the area of first amendment establishment clause jurisprudence. The other question raises the important issue of the proper standard and scope of review to be applied by federal appellate courts in first amendment establishment clause cases.

This case involves a determination of whether New Jersey's moment of silence statute, which requires that all principals and teachers in each public school in New Jersey "permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student before the opening exercises of each school day for quiet and private contemplation or introspection," violates the first amendment's prohibition against the enactment of a "law respecting an establishment of religion".

This Court has not previously decided the constitutionality of a permissive and facially neutral moment of silence statute. Recently, in *Wallace* v. *Jaffree, supra,* while six members of this Court appear to have strongly suggested that a "straight forward" moment of silence statute would pass muster under the first amendment, that issue was not then before the Court for decision. The New Jersey MOS statute places that issue squarely before this Court for decision.

Moreover, unless corrected, the majority opinion of the Third Circuit Court of Appeals will serve only to confuse and obfuscate a proper understanding and implementation of the Supreme Court's decisions in this sensitive area of first amendment jurisprudence.

While the court of appeals panel was unanimous on a number of issues, it sharply divided over the proper meaning and application of this Court's establishment clause "purpose" inquiry—an issue that has rarely been addressed or determinative in this Court's resolution of an establishment clause controversy. Thus, the entire panel agreed that the trial court had misinterpreted the MOS as mandating student particiption in a moment of silence. As reinterpreted by the panel, the language of the MOS was "permissive only" as to student participation. (App. A 15a, 31a). After review by the panel, the trial court's analysis under "entanglement" was rejected as "not persuasive" (App. A 16a-17a; 31a) and contrary to the Supreme Court's recent pronouncements in *Lynch* v. *Donnelly,* 465 U.S. 668 (1984) and *Mueller* v. *Allen,* 463 U.S. 388 (1983). Finally, the panel agreed that even if the MOS was viewed as an accommodation to religion, the district court's "effect" analysis was "flawed". (App. A 18a; 31a).

Ultimately, however, the panel disagreed over the narrow issue of the validity of the district court's conclusion that the MOS lacked a secular purpose. The majority concluded that even though it would not sustain a finding that the statute's purpose was to encourage prayer over other alternatives (App. A 29a), it was constrained to "accept" the trial court's finding that the legislature's purpose in enacting N.J.S.A. 18A:36-4 was religious "at least to the extent of requiring school districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day." (App. A 27a-28a).

According to the majority, the issue it faced had not been answered by the Supreme Court in *Wallace* v. *Jaffree, supra,* but instead was guided by the Supreme Court's more recent decision in *Estate of Thorton* v. *Caldor, Inc.,* 105 S. Ct. 2914, 2917 (1985).

> "Accordingly, because the Supreme Court has expressly required a secular purpose, when considering a constitutional challenge under the establishment clause and because the district court made a finding that N.J.S.A. 18A:36-4 lacked such a secular purpose, we hold the New Jersey statute to be unconstitutional under the first amendment."

(App. A 29a-30a).

In his dissent, Judge Becker carefully outlined a purpose analysis which had no common features with either the majority or the district court's approach. Applying that analysis, Judge Becker detailed why the trial court's finding that the MOS lacked a secular purpose was "unsupportable" under either a plenary review, as mandated by the Supreme Court's decision in *Bose Corp.* v. *Consumer Union,* 466 U.S. 485 (1984), or under a more deferential review, as had been implemented by the majority under Fed. R. Civ. P. 52(a). (App. A 44a-60a).

As will be discussed further herein, the panel majority's opinion warrants review by this Court for essentially two interdependent reasons. First, the narrow acceptance by the majority of the trial court's finding of no secular purpose incorporates (albeit in some respects *sub silentio*) a ratification of a host of substantial and fundamental errors in understanding and implementing a plethora of Supreme Court decisions which, if not corrected, will unnecessarily complicate and confuse other federal courts in the resolution of establishment clause controversies. Thus, for example, the Third Circuit majority opinion, in affirming the district court's conclusion, ratifies the trial court's unexplained rejection of a number of this Court's decisions validating the concept of a "plausible secular purpose";

sanctions the trial court's errant inquiry into subjective legislator motivation; validates the trial court's rejection of fundamental presumptions and rules of statutory construction; endorses the trial court's acceptance of and reliance on wholly inadmissible hearsay; and approves the trial court's utilization of constitutionally irrelvant evidence to second-guess the wisdom of the New Jersey Legislature in enacting the MOS.

Secondly, the panel majority's unexplained application of the "clearly erroneous" standard of review is in clear conflict with this Court's recent guidance in *Bose Corp.* v. *Consumers Union,* 466 U.S. 485 (1984); is in conflict with a number of other federal appellate decisions; and is logically inconsistent with its own conclusions as to the insufficiency of the trial court's conclusions under the "effect" and "entanglement" prongs of this Court's establishment clause test. The inexplicable application of the wrong standard of review was error compounded by a misapplication of even that standard, and unless corrected will serve to foster additional errors in the understanding and application of not only this Court's decision in *Bose,* but the traditional standard of review provided by Fed. R. Civ. P. 52(a).

I. The decision of the court of appeals, holding New Jersey's Moment of Silence Law unconstitutional based upon a finding that the legislative purpose in enacting the law was religious, was predicated upon an erroneous interpretation and application of the purpose prong of the Supreme Court's tripartite establishment clause test.

(a) The constitutional standard: the three-part test.

In analyzing the MOS under the establishment clause, the courts below purported to be guided by the three-part test set forth by this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, this Court stated:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive governmental entanglement with religion'."

Id. at 612-613.

To withstand attack under the establishment clause, the challenged state action must satisfy each of the three criteria. The court of appeals had no difficulty in reversing the district court's conclusions that the MOS failed both the "effect" and "entanglement" prongs of the *Lemon* test. (App. A 16a-22a; 31a).

In analyzing the MOS under the purpose prong of *Lemon*, while traveling different routes, both the majority of the court of appeals and the district court fundamentally erred in interpreting and applying this Court's "purpose" requirement and as a result incorrectly declared the MOS unconstitutional. The panel majority utterly failed to engage in any meaningful analysis of this Court's prior

opinions addressing "purpose", and instead ultimately abdicated its responsibility by accepting without question "the trial court's finding that the legislative purpose in enacting N.J.S.A. 18A:36-4 was religious". (App. A 27a). Curiously, the majority did not in any way question the accuracy of Judge Becker's observation in his dissent, that "[t]he evidence simply does not demonstrate that the statute lacks any secular purpose." (App. A 59a). Judge Becker's analysis of "purpose" was very different from that of the majority and is, it is submitted, consistent with and faithful to this Court's prior instructions concerning the proper meaning and application of the purpose prong.

(b) The ruling as to purpose.

As pointed out above, the court of appeals decision validating the district court's factual finding of no secular purpose incorporates a number of significant errors made by the district court in arriving at that conclusion. In conducting its purpose examination, the district court purported to peer behind the face of the MOS in order to reject (1) the explicity neutral language of the statute and (2) the plausible secular purpose that was both evident from the face of the statute and confirmed by the proofs presented by the Legislature.

In so doing, the district court announced new criteria not heretofore recognized by this Court, including a requirement that a State enactment challenged under the establishment clause have an "overwhelmingly obvious and important secular purpose". (App. B 91a). On the basis of its conclusion that the MOS had "no overwhelming secular purpose" (App. B 91a), the district court engaged in a wholly unprecedented judicial search for legislative purpose in which it entertained evidence relating to the wisdom and necessity of the MOS (App. B 82a-85a); made

assumptions outside the record concerning the history of school prayer in New Jersey (App. B 86a-87a) and New Jersey demographics (App. B 80a; 85a); permitted the introduction of legislation considered by prior independent legislatures (App. B 86a-87a; 91a-92a); received the selected hearsay utterances of a handful of legislators who spoke during (and outside) legislative committee meetings and floor debates leading to the enactment of the MOS (App. B 86a-87a; 92a); and imposed a new requirement that in order for the court to accept the plausible secular purpose identified by the Legislature at trial, that purpose must be shown to have been specifically and explicitly discussed and considered by the Legislature when it enacted the MOS. (App. B 83a; 87a-88a). In short, the district court imposed on the Legislature, in effect, a duty to establish the "actual subjective intent"— or perhaps more accurately, the "collective subjective motive"— of the legislators who enacted the MOS.

While the district court paid lip service to the Legislature's position that "constitutional analysis of legislative purpose does not involve a judicial inquiry into supposed illicit legislative motive" (App. B 91a), it nonetheless engaged in a wholly unprecedented inquiry into the alleged subjective motivation of some legislators in enacting the MOS and concluded from incomplete and highly incompetent fragments of "evidence" that the "history of this kind of legislation and the circumstances of the adoption of this particular bill point inescapably to an essentially religious purpose." (App. B 91a-92a). To reach this bald conclusion, the court relied not only on the fragmentary hearsay utterances of a handful of legislators,[4] but consider-

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[4] The New Jersey Legislature consists of two houses: an Assembly which has a membership of 80 Assembly persons and a Senate

(Footnote continued on following page)

ed without any rational explanation as to their relevancy, items of legislation that had been introduced during sessions of prior independent legislatures. (App. B 86a).

An examination of the district court's legal analysis reveals that the court had absolutely no precedental support for its unique procedure. Indeed, the only justification offered was a labored attempt to distinguish the case before it from the controlling principles enunciated by the Supreme Court in *United States* v. *O'Brien,* 391 U.S. 367 (1968). That distinction between "the motives and purposes of individual legislators and an institutional legislative purpose" (App. B 91a) was used by the district court as justification for its departure from the clear admonitions announced in *O'Brien.* As construed by the district court, *O'Brien* stood for the proposition that it was only where a statute on its face contained an "overwhelmingly obvious and important secular purpose" (App. B 91a) that a court was prohibited from exploring subjective legislative motivations. In this regard, the district court was plainly wrong.[5]

(Footnote continued from preceding page)

which has a membership of 40 Senators. During the legislative process, the MOS was voted upon by as many as 74 Assembly persons and 35 Senators. All tolled, the plaintiffs presented fragments of statements from 5 Assembly persons and 11 Senators not all of whom even reportedly stated anything relevant.

[5] The analytical basis employed by the district court in applying its distinction is entirely circular. That is, the court reviewed and relied upon the individual "motive evidence" in order to conclude that the MOS lacked an "overwhelmingly obvious and important secular purpose" which in turn permitted it to escape the evidential limitations of *O'Brien.* Thus, it used the legally improper "evidence" in order to reach a legal/factual conclusion that it could consider the self same "evidence". Moreover, purporting to draw a distinction between "motives and purposes of individual legislators"

(Footnote continued on following page)

No such distinction was recognized by *O'Brien* nor has it been recognized by any court which the district court could identify.[6] Indeed, there is no such distinction.

The district court's misreading of *O'Brien* was carried forward and compounded by the majority opinion of the court of appeals. In the process, the clear instruction of the Supreme Court's decision in *O'Brien* was further confused and drained of meaning. As read by the majority, *O'Brien* authorized the use of legislator statements (apparently from whatever source derived) whenever the court was required to determine legislative purpose. (App. A 27a, n.9). In arriving at this conclusion, the panel opinion misquotes the *O'Brien* opinion and, as pointed out by Judge Becker (App. A 50a, n.9), misreads the clear limitations identified in *O'Brien*. The uniquely limited circumstance in which the *O'Brien* court would sanction such an inquiry has no application whatsoever to an establishment clause controversy. *Cf. Washington* v. *Davis,* 426 U.S. 229, 244 n.11 (1976); *Lynch* v. *Donnelly,* 465 U.S. 668 (1984). And even where such an inquiry is authorized, there is absolutely no indication that it would authorize the use of the types of utterly unreliable hearsay that the district court considered.

Starting as early as the decision in *Fletcher* v. *Peck,* 10 U.S. 87 (1810), wherein the Supreme Court refused to

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(Footnote continued from preceding page)

and "institutional legislative purpose," it then used the former to prove the latter, thereby obliterating the putative distinction.

[6] The Supreme Court in *O'Brien* specifically rejected a similar argument that had been advanced on the basis of two of its earlier decisions, *Grosjean* v. *American Press,* 297 U.S. 233 (1936) and *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960). See *United States* v. *O'Brien,* 391 U.S. at 384-385.

void the Georgia legislature's sale of lands on the theory that its members were corrupted by impure motives in passing the legislation, it has always been well-settled that judicial inquiry into subjective legislator motives represents an improper intrusion into the affairs of another branch of government which the court will not undertake. In *McCray* v. *United States,* 195 U.S. 27, 56 (1904), the Supreme Court noted that "the decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Accord Arizona* v. *California,* 283 U.S. 423, 455 (1931) (in which Justice Brandeis cites a long list of cases holding that the courts may not inquire into the motives that induce legislative bodies to enact laws). The district court's procedure, as ratified by the court of appeals majority, is exactly the type of impermissible inquiry this Court clearly rejected in *O'Brien*:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We

> decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien, 391 U.S. at 383-384. *Accord Palmer* v. *Thompson,* 403 U.S. 217, 224-225 (1971).

The procedure adopted by the district court is totally inconsistent with Supreme Court pronouncements as to the judiciary's proper scope of review in determining the constitutionality of state legislation.[7] As Justice Black noted in *Palmer* v. *Thompson, supra,* there is an element of futility in an approach which would invalidate a law on the basis of the illicit subjective motivations of its supporters. "If, the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governmental body repassed it for different reasons." *Id.* at 255.

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[7] The *O'Brien* analysis is particularly applicable to the district court's reliance upon prior legislative proposals (spanning 10 years) as constituting proof of an illicit subjective legislative motivation for the MOS. (See App. B 86a). First, the district court failed to provide any rational way to determine how the acts of prior legislators and independent legislative bodies indelibly mark the subsequent activities of an independent legislative body. Secondly, even assuming arguendo that there were certain supporters of the prior legislation who also voted for the MOS, the district court failed to explain how it could determine that such legislators' subjective motives had remained stagnant. And finally, as made clear by *O'Brien*, even assuming arguendo that the prior legislators who had supported the earlier legislation had maintained their subjective views (and that those views were clear), the district court failed to explain how those views could be imputed to the multitude of other legislators who voted for the MOS.

The district court's procedure in the instant case was completely contrary to all of the guidance that has been supplied by the Supreme Court and was clearly in error.

In affirming the district court's purpose finding, the court of appeals majority, *sub silentio,* endorsed the trial court's unprecedented purpose analysis. In so doing, the majority totally ignored this Court's teaching in *Mueller* v. *Allen,* 463 U.S. 388, 394-395 (1983) that the judiciary should be reluctant "to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute".

Moreover, in ratifying the district court's search to find religious purpose—as opposed to accepting a clearly plausible secular purpose—the majority completely ignored expressions from members of this Court which support the proposition that a facially neutral moment of silence statute presumptively has a secular purpose. See *School District of Abington Township* v. *Schempp,* 374 U.S. 201, 281 (1963) (Brennan, J., concurring) (wherein Justice Brennan noted that "the observance of a moment of reverent silence at the opening of class [may serve] the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government."); see also *Wallace* v. *Jaffree,* 105 S. Ct. 2491 (opinion of Stevens, J.); at 2493 (Powell, J., concurring); at 2498-2499 (O'Connor, J., concurring).[8]

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[8] Many constitutional scholars have argued that moments of silence may be constitutional. See L. Tribe, *American Constitutional Law* §14-6 at 829 (1978); P. Freund, *Religion and the Pubilc Schools*: The Legal Issue, at 23 (1965); J. Choper, *Religion in the Public Schools; A Proposed Constitutional Standard,* 47 Minn. L. Rev. 329, 371 (1963); P. Kauper, *Prayer, Public Schools and the Supreme Court,* 61 Mich. L. Rev. 1031, 1041 (1963).

Although the majority opinion acknowledges, as it must after *Jaffree,* that "in the abstract" the Supreme Court would uphold a statute such as the moment of silence, ultimately it concludes that the expressions of the various Justices in *Jaffree* do not provide a clear answer for the case before it. Instead, by accepting the district court's finding of no secular purpose and by ignoring the clear guidance of this Court as to the acceptability of a "plausible" secular purpose to satisfy the "purpose" inquiry, the majority ironically concludes that its decision must be guided by *Estate of Thorton* v. *Caldor, Inc.,* 105 S. Ct. 2914 (1985) (a case decided principally under the effect prong) and invalidates the MOS as unconstitutional.[9]

Thus, despite its conclusion that the MOS is a neutrally worded statute which is facially and operationally constitutional (and could not be found to endorse prayer), the court of appeals nonetheless found that the MOS violated the establishment clause by embracing the district court's finding that the law lacked a secular purpose. In so ruling, the court of appeals sanctioned not only the trial court's unjustified rejection of Supreme Court decisions endorsing the validity of a "plausible" secular purpose, but more importantly, approved the district court's unprecedented search for subjective legislator motive as an answer to the Supreme Court's "purpose" test. In the end, both the court of appeals and the district court transmogrified this Court's "secular purpose" standard into "a subjective legislator motive" test—a test and standard that has never been recognized or announced

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[9] In the process, the majority fail to mention, much less address, how it escapes the application of the presumption of constitutionality identified by Judge Becker in his dissent. (App. A 38a).

by this Court.[10] *See McGowan* v. *Maryland,* 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring).

(c) The proper purpose analysis.

As pointed out by Justice Rehnquist, the *Lemon* test's "secular purpose prong has proven mercurial in application because it has never been fully defined" nor has this Court "ever fully stated how the test is to operate". *Wallace* v. *Jaffree,* 105 S. Ct. 2479, 2517 (1985) (Rehnquist, J., dissenting). Despite this shortcoming, Justice Powell has observed that the *Lemon* standard itself is the "only coherent test a majority of this Court has ever adopted" in analyzing an establishment clause case. *Id.* at 2494 (Powell, J., concurring). Indeed, in only two cases since the enunciation of the tripartite test, in *Larson* v. *Valente,* 456 U.S. 228 (1982) and *Marsh* v. *Chambers,* 463 U.S. 783 (1983), has the Supreme Court resolved an establishment clause issue without applying the *Lemon* test.

In reviewing this Court's establishment clause decisions, one thing is clear: the Court's purpose inquiry will start with the statute itself. In fact, the decisions of this Court reflect that generally the Court's examination of purpose has not strayed from the face of the enactment. *See, e.g., Committee For Public Education* v. *Nyquist,*

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[10] As a result of its reinterpretation of the MOS as a permissive statute, the panel majority devotes considerable time to the discussion of the concept of "accommodation." (App. A 9a-15a). Ultimately, however, the majority recognizes that this characterization does not resolve the constitutional issue (App. A 15a) and in the end the discussion of accommodation is essentially irrelevant to its determination under the purpose prong. It is beyond dispute, however, that if, as urged by the Legislature, the majority is wrong as to purpose, than its "effect" and "entanglement" analyses are nonetheless valid for a statute with a secular purpose as for one viewed as an accommodation.

413 U.S. 756, 773 (1973) ("we need touch only briefly on the requirement of a secular purpose. As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests."); *Sloan* v. *Lemon,* 413 *U.*S. 825, 829-830 (1973); *Lemon* v. *Kurtzman,* 403 U.S. 602, 613 (1971).

Where an enactment does not contain an explicit statement as to its particular secular purpose, the Supreme Court has not hesitated to infer a "plausible" secular purpose. In *Mueller* v. *Allen,* 463 U.S. 388, (1983) this Court stated:

> "This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

Id. at 394-395.

In *Lynch* v. *Donnelly,* 465 U.S. 668 (1984), Chief Justice Burger noted that "[t]he court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Id.* at 680.

Similarly, in *Wallace* v. *Jaffree,* 105 S. Ct. 2479 (1985) Justice Powell observed that only after a court is "unable to discern an arguably valid secular purpose" would the Court be required "by our precedents to hold that the statute fails the first prong of the *Lemon* test". *Id.* at 2495 (Powell, J., concurring).

While a statute must satisfy each prong of the three prong test, the purpose prong has rarely been determi-

native of the inquiry, since it may be satisfied by a plausible secular purpose. Most recently, in *Wallace* v. *Jaffree, supra,* (statute permitting public school teachers to observe a one minute period of silence to be used by students for meditation *or voluntary prayer*) this Court held, after distinguishing the Alabama statute under review from an earlier Alabama law—the text of which is not significantly different from New Jersey's moment of silence law—that the later law was unconstitutional because a plausible secular purpose could not be discerned from its face nor was any non-religious reason for the statute's enactment offered or identified. In *Stone* v. *Graham,* 449 U.S. 39, 42 (1980) (statute requiring posting of ten commandments), this Court rejected a statement of secular purpose placed on the face of the statute because of the *inevitable* religious effect of posting such an "undeniably sacred text". In *Stone,* the Court did not peer behind the statute, but instead held that the use of an undeniably religious symbol served to define the "purpose" of the statute as a matter of law—subjective intent to the contrary notwithstanding.[11] Finally, in *Epperson* v. *Arkansas,* 393 U.S. 97, 107 (1968) (statute enacted by popular referendum barring the teaching of evolution), this Court invalidated the statute because no discernable secular pur-

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[11] While the purpose prong was not expressly discussed in this Court's recent decision in *Estate of Thorton* v. *Caldor, Inc.,* 105 S. Ct. 2914 (1985), both the clear language of the statute, as well as the inevitable operative effect (favoring Sabbath observers), support the foregoing view. Thus through the use of its "effect" test, the Court has been able to resolve the issue without search for subjective legislator motivation. Indeed, in *Jaffree,* Justice O'Connor expressly suggested that where reliable legislative materials are not available to call a close case, the inquiry under the "effect" prong should serve to decide those cases where the validity of an expressed secular purpose is in doubt. *Wallace* v. *Jaffree,* 105 S. Ct. at 2500 (1985).

pose could be inferred—and none was suggested "other than the religious views of the [the state's] . . . citizens".

In none of this Court's decisions has the Court attempted to intrude into the area of subjective legislator motive when faced with a facially neutral unambiguous statute. The decisions of this Court demanded that judicial inquiry into the purpose of a legislature in enacting a law be limited. *See Everson* v. *Board of Education,* 330 U.S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose); *McGowan* v. *Maryland,* 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring). In *Jaffree,* Justice O'Connor commented on the scope of judicial review into legislative purpose: "If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Id.* at 2500 (O'Connor, J., concurring). Also in *Jaffree,* Chief Justice Burger observed this Court's long established precedent of "determining legislative purpose from the face of a statute as a whole." *Id.* at 2506 (Burger, C.J., dissenting).

Here, the district court and the majority of the court of appeals simply chose to ignore all of this Court's teachings pertaining to the limited scope of an examination for legislative purpose. More importantly, their collective decisions reveal a fundamental lack of understanding of this Court's "purpose" inquiry in a constitutional setting. No attempt was made to determine the legislative purpose from the face of the neutral statute nor was any deference accorded to the "plausible" secular purpose identified and advanced by the Legislature. Instead, the district court veered in another direction under a new and unsanctioned

standard which it viewed as permitting it to rely on irrelevant evidence concerning the lack of wisdom, necessity and efficacy of the MOS; enabling it to patch together illogical inferences on the basis of other attempts by earlier independent New Jersey legislatures to return prayer to the public schools; and most disturbingly, permitting it to entertain the introduction of a hodgepodge of inadmissible hearsay comments from a handful of legislators in order to arrive at its conclusion that the MOS lacked an "overwhelmingly secular purpose." When analyzed under the principles recited above, it is manifest that both the district court and the majority of the court of appeals erred not only in understanding the proper scope of the purpose inquiry, but also erred in misapplying a number of fundamental decisions of this Court guiding inquiry in an establishment clause challenge.

II. The court of appeals erred in applying a "clearly erroneous" standard of review to this first amendment establishment clause controversy.

The court of appeals majority employed a clearly erroneous standard of review, and, therefore, let stand the district court's putatively factual determination that the New Jersey Legislature's purpose in enacting N.J.S.A. 18A:36-4 was religious. Notwithstanding the fact that such a finding: (1) involves the ultimate constitutional fact which goes to the heart of the purpose prong of the *Lemon* test; (2) at the very least, involves a mixed question of fact and law; and (3) directly implicates the constitutional claims of the parties, the majority chose to limit its review of the record below, under Fed. R. Civ. P. 52(a).

The most recent pronouncement of this Court as to the standard of review in cases involving substantial consti-

tutional rights is *Bose Corp* v. *Consumers Union,* 466 U.S. 485 (1984). In *Bose,* this Court held that an appellate court is required to independently review the entire trial court record in order to preserve the liberties established by the United States Constitution. The *Bose* court exercised plenary review of a lower court's finding of actual malice in a libel case. As the dissent below points out, a determination of whether a speaker had "actual malice" is, in a constitutional sense, identical to determination of whether a legislature had a secular purpose; both are important "constitutional facts" which presuppose a legal standard and have potentially grave effects on first amendment rights.

The determination of whether a statute has a secular purpose goes to the very heart of the matter. It involves not only an analysis of the facts presented but also a complete understanding and appreciation for the first amendment rights directly and inextricably implicated. The "facts" alone cannot be reviewed in a vacuum—by the trial court or by the appellate court. Their constitutional significance is manifest.

The standard of review employed by the court of appeals majority is contrary to decisions of this Court, decisions of the Third Circuit in other cases, as well as the decisions of other courts of appeals. In *Bob Jones University* v. *United Sta'es,* 461 U.S. 574 (1983), this Court reviewed the lower court's finding of an institution's purpose as primarily educational or religious under a plenary standard of review. In *Presbyterian & Reformed Publishing Co.* v. *Commisioner of Internal Revenue,* 743 F.2d 148 (3d Cir. 1984), the Third Circuit, following *Bob Jones,* held that the Tax Court's determination of purpose was subject to plenary review.

Similarly, in *Bender* v. *Williamsport Area School District,* 741 F.2d 538 (3d Cir. 1984), *cert. granted,* 105 S. Ct. 1167 (1985) the Third Circuit acknowledged that when presented with "constitutional facts", an appellate court is free to draw its own inferences from the record. 741 F.2d at 542. Significantly, and in sharp contrast to the panel which decided this matter, the Third Circuit in *Bender* recognized that independent appellate review was appropriate in cases involving constitutional and, in particular, first amendment rights.

Other courts of appeals have also refused to be bound by the clearly erroneous standard set forth in Fed. R. Civ. P. 52(a) when presented with first amendment issues. In *Brasslett* v. *Cota,* 761 F.2d 827 (1st Cir. 1985), the plaintiff, a public employee, claimed that he was discharged in violation of his first amendment rights for remarks he made during a television interview. Noting that *Bose* reaffirmed the rule of independent appellate review historically applied in first amendment cases, the First Circuit undertook an independent review of the district court's finding that plaintiff's statements to the press were unprotected under the first amendment. *Accord McMullen* v. *Carson,* 754 F.2d 936 (11th Cir. 1985). *See also United States* v. *Merrill,* 746 F.2d 458, 463-464 (9th Cir. 1984) (different levels of appellate review in obscenity case for each prong of the test set forth in *Miller* v. *California,* 413 U.S. 15 (1973)); *Lebron* v. *Washington Metro Area Transit Authority,* 749 F.2d 893 (D.C. Cir. 1984) (where plaintiff claimed violation of first and fourteenth amendment rights when defendant refused to allow him to display his poster which criticized the Reagan administration; the court independently examined the whole record, following *Bose*).

Although some courts purport to limit *Bose* to defamation matters (or even further)[12] it must be emphasized that *Bose* was a reaffirmation of the well established principle that questions of constitutional fact compel an appellate court's *de novo* review of the record. As the *Bose* court explained:

> This Court "has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so, 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.'"

80 L. Ed. 2d at 522 n.27, quoting *Jacabellis* v. *Ohio*, 378 U.S. 184, 190 (1964) (opinion of Brennan, J.).[13]

As urged by Judge Becker in his dissent, there is no logical reason why in this critical area of constitutional

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[12] *See Bartimo* v. *Horsemen's Benevolent and Protective Ass'n* 771 F.2d 894, 896-897 (5th Cir. 1985); *Tavoulareas* v. *Piro, Inc.*, 759 F.2d 90, 97 (D.C. Cir. 1985); *Levine* v. *CMP Publications*, Inc., 753 F.2d 1341 (5th Cir. 1985) (en banc) (Rubin, J., dissenting); *cf. Olivieri* v. *Ward*, 766 F.2d 690 (2d Cir. 1985) (Kearse, J., dissenting).

In *Renton* v. *Playtime Theaters, Inc.*, 748 F.2d 527 (9th Cir. 1984), *rev'd*, 54 U.S.L.W. 4160 (U.S. Feb. 25, 1986) the Ninth Circuit followed *Bose* and refused to apply a clearly erroneous standard to the district court's findings on the factors set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968) to determine the constitutionality of a government regulation affecting speech. This Court did not reach the issue because it found that under any standard of review the district court's findings should not have been disturbed. 54 U.S.L.W. at 4163 n.3.

[13] More recently, in *Miller* v. *Fenton*, 106 S. Ct. 445, 452 (1985), this Court refused to "abandon the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal

(Footnote continued on following page)

concern plenary review should not be undertaken. (App. A 44a-47a). Indeed, in this Court's more recent establishment clause opinions, it is clear that the Court, albeit *sub silentio,* has implemented a plenary review standard. See, *e.g., Lynch* v. *Donnelly,* 465 U.S. 668 (1984); *Estate of Thorton* v. *Caldor, Inc.,* 105 S. Ct. 2914 (1985); *Witters* v. *Washington Dept. of Services for the Blind,* 106 S. Ct. 748 (1986).

The court of appeals panel majority in contradiction to a number of decisions by other federal appellate courts (including decisions by other panels of its own court) implemented the wrong standard of review which, as the dissent persuasively points out, it then misapplied in the instant case. (App. A 27a; 58a-60a). In so doing, the majority purported to escape its responsibility to correct the fundamental errors that permeated the district court's implementation of this Court's "purpose" test.

CONCLUSION

Based upon the record below, it is respectfully submitted that the district court improperly confused and intermixed the judicially distinct concepts of legislative intendment or "purpose" with individual legislator "motive", leading the court to gather a gallimaufry of fractional "facts" to purport to devine an illicit, though facially unapparent, resolve on the part of the New Jersey Legislature. In doing so, the district court has pieced

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review." The Court reversed the Third Circuit's decision, which had employed the clearly erroneous standard of Rule 52(a). *Miller,* 741 F.2d at 1464 (3d Cir. 1984). It is noteworthy that Judge Gibbons dissented, apparently believing that less deference should be afforded the trial court in voluntary confession cases than in cases implicating first amendment rights.

together, in patchwork fashion, a flimsy matrix of disjointed, and generally inadmissible, "evidence" in order to support a conclusion of "purpose" otherwise suppositious from the legislative backdrop—a manner of inquiry into governmental action often warned against by this Court and surely never sanctioned. Further, the legal standards, as espoused by this Court, were tormented, in procrustean fashion, to fit the "facts." This error was compounded by the court of appeals by way of its peculiar, and plainly ambivalent, refusal to review the significant constitutional issues in plenary fashion, accepting instead the "clearly erroneous" standard not applicable to matters of basic constitutional dimension.

The challenged enactment passes constitutional muster according to the tests articulated by this Court and should be upheld in order to give guidance to the nation's courts and people in this sensitive area of the law.

We respectfully submit that the Court of Appeals for the Third Circuit incorrectly affirmed the judgment of the district court and erroneously declared a state statute unconstitutional. We believe that the questions as presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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March 19, 1986

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5890 and 84-5126

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK SCHORSKE, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION

Defendants

ALAN J. KARCHER as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO as President of the New Jersey Senate; the NEW JERSEY SENATE,

Defendant Intervenors

New Jersey Council of Churches
New Jersey Education Association

Alan J. Karcher as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio as President of the New Jersey Senate, the New Jersey Senate, Defendant Intervenors,

Appellants

Appendix A

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY - NEWARK

(D. C. Civil No. 83-0089)

Argued October 26, 1984

Reargued August 13, 1985

Before GIBBONS and BECKER, *Circuit Judges* and KATZ, *District Judge**

(Filed December 24, 1985)

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* Hon. Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

This appeal by the New Jersey Senate and Assembly as intervening defendants seeks to overturn a declaratory judgment of the district court that N.J.S.A. 18A:36-4 (West 1984-1985) violates the

establishment clause of the first amendment. The intervening defendants also appeal from a declaratory judgment that plaintiffs are entitled to counsel fees on the authority of 42 U.S.C. § 1988 (1982). The appeal requires that we assess the impact on the district court's ruling of the subsequent decision of the Supreme Court in *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). We affirm the declaratory judgment that the statute is unconstitutional, but dismiss the appeal from the declaratory judgment on fees.

I.

The challenged statute, passed by the New Jersey Legislature over the Governor's veto on December 16, 1983, provides,

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before opening exercises of each school day for quiet and private contemplation or introspection.

N.J.S.A. 18A:36-4. Shortly after its passage, on January 10, 1983, several public school pupils, several parents of public school pupils, and one public school teacher filed a verified complaint seeking a declaration that N.J.S.A. 18A:36-4 is unconstitutional, on its face and as applied, and an injunction prohibiting the defendants from implementing it. The named defendants are Saul Cooperman, Commissioner of New Jersey's Department of Education, the Edison Township Board of Education, and the Old Bridge Township Board of Education. Cooperman was joined because he allegedly is charged with implementing, enforcing, and promulgating N.J.S.A. 18A:36-4. *See* N.J.S.A. 18A:4-23 (West 1968) ("The Commissioner

shall have supervision of all schools of the state receiving support or aid from state appropriations. . . ."). The two Boards of Education were joined because the schools operated by them allegedly took steps to implement the statute.

On the day the complaint was filed the district court issued a temporary restraining order enjoining the defendants from enforcing N.J.S.A. 18A:36-4. Thereafter it became known that the New Jersey Attorney General, who under New Jersey law would normally be responsible for defending Commissioner Cooperman, would not defend the constitutionality of the Act. On January 14, 1983 the temporary restraining order was modified so as to direct the Commissioner of Education

> to notify the school districts of the State of New Jersey . . . that this Court has made an initial determination that P.L. 1982, Ch. 205 [N.J.S.A. 18A:36-4] is unconstitutional and that a temporary restraint has been issued restraining any further enforcement of that provision by defendants and that pursuant to the further Order of this Court the local school districts of the State of New Jersey, their officers, agents, servants, and employees and successors are to immediately cease any further enforcement of P.L. 1982, Ch. 205, pending a hearing for a Preliminary Injunction.

Joint Appendix 56-57. By the time the January 14, 1983 order had been entered the court was aware that, while the Attorney General would not defend the legislation, the President of the New Jersey Senate, the Speaker of the New Jersey General Assembly, the Senate, and the General Assembly (legislators) sought to intervene for that purpose. Those applicants for intervention consented to the January 14, 1983 modification of the temporary restraining order,

although it is not clear why they had any authority to consent to an order purporting to bind nonparty school districts. On January 18, 1983 the legislators' motion to intervene was granted. They and the named defendants on the same day consented to the entry of an order enjoining enforcement of N.J.S.A. 18A:36-4 until the further order of the court.

Thereafter the Attorney General filed on behalf of the Commissioner of Education an answer in which he denied that he had implemented, or was charged with the duty of implementing, enforcing, or promulgating N.J.S.A. 18A:36-4. The answer also pleaded that the plaintiffs had not been deprived of any rights, privileges, or immunities secured to them by the United States or the New Jersey Constitutions. Thus the Attorney General's answer appears to put in issue the question whether the Commissioner is an appropriate defendant and also the question whether N.J.S.A. 18A:36-4 is unconstitutional. The Attorney General did not, however, take any further steps in defense of the merits of the complaint.

The School District of Old Bridge Township also filed an answer, in which it admitted instituting, pursuant to N.J.S.A. 18A:36-4, the practice of observing a moment of silence. Edison Township School District apparently defaulted. Neither it nor Old Bridge Township School District took any further active role in the litigation.

The answer of the intervening legislators, in contrast with that of the Commissioner of Education, admitted that the Commissioner was charged with the duty of implementing, enforcing, and promulgating N.J.S.A. 18A:36-4. The legislators also defended the constitutionality of the legislation through final hearing, which commenced on September 15, 1983. Prior to the final hearing the district court resolved several disputes over discovery, to which further reference is made below.

Appendix A

The district court made findings of fact and conclusions of law in support of a final judgment, dated November 10, 1983 "that New Jersey P.L. 1982, Ch. 205 is unconstitutional on its face and as applied, and that judgment is granted in favor of the plaintiffs herein." Joint Appendix 272. The final judgment contains no injunction. The preliminary injunction presumably terminated upon the entry of the final judgment. Thus we review only a declaratory judgment.

When the declaratory judgment was entered the district court ruled initially that the plaintiffs were not entitled to attorney's fees and costs pursuant to 42 U.S.C. § 1988 (1982). *See May v. Cooperman*, 572 F. Supp. 1561, 1576 (D.N.J. 1983). Thereafter plaintiffs moved for reconsideration of their fee application. On January 26, 1984 the court ordered that the November 10, 1983 order be amended to award counsel fees and costs as against the legislators intervenors only. Joint Appendix 299. The January 26 order directed plaintiffs' counsel to submit an affidavit of services and costs. *Id.* The intervening legislators filed a notice of appeal from the January 26, 1984 order, seeking a reversal both of the declaratory judgment that N.J.S.A. 18A:36-4 is unconstitutional and of the declaratory judgment that the plaintiffs are entitled to a fee award. At the time of the notice of appeal, however, the district court had not determined the amount of fees and costs to be awarded.[1]

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1. The amount was subsequently fixed on March 28, 1984. *See* May v. Cooperman, 582 F. Supp. 1458 (D.N.J. 1984). As this award was fixed after the notice of appeal had been filed, the issue of the fee award is not properly presented for our review. *See* West v. Keve, 721 F.2d 91, 94-97 (3d Cir. 1983). The final declaratory judgment on the merits is nevertheless reviewable at this time. *See* Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279, 286 n.2 (3d Cir. 1983); West v. Keve, 721 F.2d 91, 93 (3d Cir. 1983); Kane Gas Light & Heating Co. v. International Bhd. of Teamsters, 687 F.2d 673, 677 n.5 (3d Cir. 1982), *cert. denied*, 460 U.S. 1011 (1983).

Appendix A

II.

Because N.J.S.A. 18A:36-4 became law shortly before the public schools of New Jersey recessed for the traditional Christmas holiday, and because its implementation was enjoined pendente lite shortly after that recess ended, there was little available evidence of the actual operation of the Act. The Commissioner of Education took no steps to construe it or in any way to implement it. The two named defendant school districts took certain steps to implement the Act, some of which are discussed hereafter, but neither the New Jersey Department of Education nor the New Jersey courts have addressed the question whether the steps taken by those school districts are consistent with the Act. The Act contains no enforcement mechanism of its own. It may fall within the purview of N.J.S.A. 18A:6-9 (West 1968), which provides, "The Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws . . . ." So far as the record discloses, no controversies or disputes over this Act have been presented to the Commissioner.[2]

The arid circumstances in which the case was litigated is of some significance because of the rather ambiguous statutory language, which provides,

> Principals and teachers . . . shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student . . . for quiet and private contemplation or introspection. . . .

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2. No party has urged that exhaustion of the remedies available under N.J.S.A. 18A:6-9 is a precondition to relief under 42 U.S.C. § 1983 (1982). *See* New Jersey Education Ass'n v. Burke, 579 F.2d 764, 779 n. 24 (3d Cir.), *cert. denied*, 439 U.S. 894 (1978) (exhaustion of remedies before Commissioner of Education not a precondition to section 1983 relief).

N.J.S.A. 18A:36-4. If the Act said "shall not permit students to observe a period of silence," its meaning would be straight forward, and we would probably be discussing a free exercise claim rather than an establishment claim.[3] If the Act said "shall require students to observe a period of silence," its meaning would be equally straightforward, and the focus of the free exercise claim commensurately narrower. The "shall permit" language on its face does not inform us what role the legislature intended for principals and teachers. One possible interpretation is that the legislature intended to compel teachers to require that all pupils engage in a silent moment. Another is that if some pupils desire to remain silent teachers will require that other pupils accommodate their conduct so as not to disturb the silent ones. A third is that teachers should merely permit those pupils desiring to remain silent for a minute at the beginning of the school day to do so, while other pupils go about their business.

The district court's opinion appears to proceed on the assumption that the Act should be construed in the first manner; that is, that it directs that all pupils be required to engage in a silent moment.[4] Because the

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3. *See* Widmar v. Vincent, 454 U.S. 263 (1981); Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1167 (1985).

4. The district court opinion is somewhat ambiguous in this respect. At one point the court opines, "What the minute of silence Bill has done is to mandate that all students assume the posture of one traditional form of prayer." May v. Cooperman, 572 F. Supp. 1561, 1569 (D.N.J. 1983). Elsewhere the court observes,

> It is unclear whether Bill 1064 requires that every student remain present during the minute of silence or whether it simply requires that every student be given an opportunity to observe a minute of silence with the right of those who do not wish to participate to absent themselves.

Id. at 1570.

Attorney General did not participate on behalf of the Commissioner of Education, we have no way of knowing how New Jersey education officials at the state level would construe the statute.

To some extent, the intervenor legislators lent support to the district court's apparent interpretation that the Act means "shall require" rather than "shall permit." Their defense of the Act suggested that it had the secular purpose of providing a calm transition from nonschool life to school work. Obviously, the calm transition explanation would be plausible only if the minute of silence were mandated for all pupils. The district court rejected this posited secular purpose as an after-the-fact rationalization and a pretext. The court nevertheless assumed that the Act mandated a compulsory moment of silence for all pupils.

Our puzzlement over the district court's apparent interpretation of the "shall permit" language is not lessened by a review of previous efforts in New Jersey to deal with the subject of school prayer and moments of silence. Plainly the legislators most interested in the two subjects were quite aware of the difference between a statute requiring student participation in a moment of silence and one merely permitting students desiring to do so to observe such a moment. In 1968, 1969, and 1970 the legislature passed bills that, in contrast with N.J.S.A. 18A:36-4, provided,

> In each public school classroom, the teacher in charge may, or if so authorized or directed by the board of education by which he is employed, *shall*, at the opening of the school upon every school day, *conduct a brief period of silent* prayer or meditation *with the participation of all pupils* therein assembled.

A. 640 (1968)(emphasis supplied); A. 146 (1969); A. 597 (1970). Each of these enactments was vetoed by

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Governors Hughes and Cahill, who were in office at the respective times of enactment. Governor William Cahill in his veto message returning Assembly Bill No. 597 to the legislature observed, "Insofar as the bill provides for a brief period of meditation, it is unnecessary since there is presently no provision of law which prohibits individual teachers or school authorities from holding moments of silence in the classroom." Some school districts, the evidence discloses, did in fact hold moments of silence in the classroom before the vetoed bills were passed.[5]

Despite vetoes by two successive governors, a bill identical to that quoted above was pre-filed in the 1972 legislative session. A. 133 (1972). In 1974 a bill was introduced that initially substituted the word "may" for "shall" conduct, which apparently would have made the exercise optional with teachers, but not with pupils. A. 373 (1974). It was amended in committee to restore the word "shall". Assembly Committee Amendments to A. 373. In 1976 a bill identical to that vetoed by Governors Hughes and Cahill was pre-filed. A. 648 (1976). That same year another bill was introduced similar in langauge to Assembly Bill No. 648, except that it provided that if the local school district authorizes it a teacher "may" rather than "shall" conduct a moment of silence. A. 2159 (1976). Assembly Bill No. 648 was amended in committee to read, "In each public school classroom, the teacher shall at the opening of school upon every school day, conduct a period of silent meditation with the participation of all the pupils therein assembled." Thus as amended, the 1976 version of Assembly Bill No. 648 would have removed any local school board option and made mandatory the participation of all pupils in a

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5. There is in evidence a videotape of the moment of silence observed for many years in the schools of Sayreville, New Jersey.

moment of silence. The statement of the Assembly Education Committee to Assembly Bill No. 648 indicates that the amended version was modeled upon Mass. Gen. Laws Ann., Ch. 71, § 1A (West 1982) which was held to be constitutional in *Gaines v. Anderson*, 421 F. Supp. 337 (D.Mass. 1976)(three judge district court). The *Gaines v. Anderson* court reasoned that when Massachusetts legislature struck the word "prayer" from the bill that became law and substituted the word "meditation," it "demonstrated awareness of the distinction between these two words and an intention to further secular purposes without infringing the values protected by the Establishment Clause." *Id.* at 342. The Massachusetts law is mandatory, and the Assembly Committee's reference to it presumably conveys the intention of accomplishing a mandatory silent moment that would be recognized as having a secular purpose. The legislature's awareness of the distinction between mandatory and permissive legislation on the subject in issue is confirmed by the Report of the Senate Education Committee on Assembly Bill No. 648 and Senate Bill No. 3042. The report notes, "Assembly Bill No. 648 is a modification of proposals introduced in previous sessions and requires rather than permits a brief period of silent meditation. Senate Bill No. 3024 would make it optional with the local districts." The report refers to similar legislation in Connecticut, Public Act No. 74-367, § 2, Pennsylvania, 24 P.S. § 15-1516.1, and Massachusetts, Mass. Gen. Laws Ann., Ch. 71 § 1A. Bill No. 648 as amended was passed, but vetoed by Governor Byrne.

Bills that would make pupil participation mandatory were introduced in subsequent legislatures. *E.g* A. 1028 (1980) (local option); A.342 (1980) (all school districts); A.2197 (1981) (local option; amended by Senate to require moment of

silence in all school districts. Assembly Bill 2197 was passed but it, too, was vetoed).

After 1976 the moment of silence bills all omitted specific reference to prayer. The Bill that became law in 1982 also omitted any specific reference to prayer. In Assembly Bill No. 1064, introduced on March 8, 1982, however, the supporters of a moment of silence changed their proposal significantly. The caption and enacting clause read,

> *An Act* to *allow* students of public schools to participate in a 1 minute period of silence before the opening of each school day and supplementing Chapter 36 of Title 18A of the New Jersey Statutes.
>
> Be it enacted *by the Senate and General Assembly of the State of New Jersey:*
>
> 1. Principals and teachers in each public elementary and secondary school district in this state *shall permit students to observe* a 1 minute period of silence to be used *solely at the discretion of the individual student*, before the opening exercises of each school day for quiet and private contemplation or introspection.
>
> 2. This Act shall take effect immediately.

A. 1064 (1982)(emphasis supplied). This Bill was referred to the Senate and Assembly Education Committees, which filed identical reports as follows:

> Assembly Bill No. 1064 requires all principals and teachers in the public elementary and secondary schools of New Jersey to permit students to observe one minute of silence before the opening exercises of each school day. The bill provides that the one minute of silence is to be used solely at the discretion of the individual student for quiet contemplation or introspection.

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A statute similar to that proposed in Assembly Bill No. 1064 was enacted in Massachusetts and has been upheld by the United States District Court of Massachusetts. (Civil Action No. 76-435-M, September 1, 1976).

Statements of Senate and Assembly Education Committees to A. 1064. This Bill is consistent with prior legislative efforts to eliminate the local school district option. It is inconsistent with prior legislative efforts, in that all prior moment of silence proposals mandated the participation of all students.

The New Jersey Legislature does not preserve a transcription of its committee hearings or floor debates. Several witnesses who attended hearings of the Senate or house Education Committee and floor discussion on the Bill testified about what transpired in those proceedings. None of these witnesses referred to anything that took place during the proceedings that would lend support to a reading of the proposed law as mandating student participation.[6] Indeed the only relevant remark to which any witness referred was Marianne Rhode's quotation of Senator Ewing: "Why shouldn't this be allowed? Why not give students the opportunity?" Trial transcript, Sept. 14, 1983, p. 231. There is, so far as we have been able to discover, no other legislative history bearing on the proper interpretation of N.J.S.A. 18A:36-4.

Given the legislature's fairly clear understanding of the difference between legislation mandating a certain action and legislation permitting it, the statement of purpose in Assembly Bill 1064, the wording of the

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6. The witnesses included Joseph Chuman, affiliated with the Society for Ethical Culture, Marianne Rhodes, Associate Director of Government Relations of New Jersey School Board Assocation, and Rev. Dudley E. Sarfaty, Associate General Secretary of the New Jersey Council of Churches.

Education Committee reports on that Bill, and the absence of any legislative history suggesting that the Bill means other than what it says, we conclude that the challenged law is, insofar as student participation is concerned, permissive only.

Although our reading of N.J.S.A. 18A:36-4 is significant in determining the validity of the Act, it does not change the nature of constitutional analysis to be applied. Viewing N.J.S.A. 18A:36-4 as an accommodation statute broadens the issue, but because the state legislators chose to act the statute must still be evaluated as an establishment clause case, and not a free exercise statute. *See Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985) (analyzing a state statute that provided private sector employees with the right not to work on their Sabbath under the establishment clause). Thus the issue presented by this appeal is whether a state may direct school principals and teachers to permit pupils desiring to do so to observe a moment of silence at the beginning of the school day.

II.

The Supreme Court has conceded that the principles embodied in the establishment clause of the first amendment have proven difficult to apply. *See Lynch v. Donnelly*, 104 S. Ct. 1355, 1370 (1984) (Brennan, J., dissenting). Faced with this difficult application, the Court has sought guidance by analyzing establishment clause cases under the three-part disjunctive test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon* the Court stated, "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.*

at 612-13 (citations omitted). Although this test has been questioned by certain members of the Court, *see Wallace v. Jaffree*, 105 S. Ct. at 2497 (O'Connor, J., concurring), in the Court's most recent establishment clause case, a clear majority endorsed the *Lemon* test as the rubric under which a challenged governmental practice will be judged. *See Wallace v. Jaffree*, 105 S. Ct. at 2489; *see also Lynch v. Donnelly*, 104 S. Ct. at 1362.

The district court, applying the three-part disjunctive test of *Lemon v. Kurtzman*, concluded that the law failed in each respect. According to the district court, the law was enacted for a religious rather than a secular purpose, had the effect both of advancing and of inhibiting religion, and fostered excessive government entanglement with religion. Because we disagree with the district court's analysis in some respects, it is convenient to reverse the usual order of discussion of the *Lemon v. Kurtzman* standards.

A.

Entanglement

Supporting its conclusion that the law would foster an excessive entanglement with religion, the district court reasoned,

> Implementation of the Bill would not involve the State in the kind of continued and pervasive monitoring of sectarian activities which were condemned in *Lemon v. Kurtzman, supra*. It would, however, tend to promote divisiveness among and between religious groups, another form of entanglement. *Gilfallan v. City of Philadelphia* [637 F.2d 924] 932 [(3d Cir. 1980)]. A required moment of silence would pit children and parents who believe in prayer against children and parents who do not.

May v. Cooperman, 572 F. Supp. at 1575.

We do not find this reasoning persuasive. In the first place, as noted in Part I, we are not dealing with a "required" moment of silence, if by "required" is meant an exercise in which all pupils are required to participate. Moreover, the Supreme Court has never held that the potential for political disagreement over government action accommodating religious beliefs is sufficient to trigger the application of the excessive entanglement test. Indeed in *Lynch v. Donnelly* the Court expressly stated "that this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct." 104 S.Ct. at 1364. *See also Mueller v. Allen*, 463 U.S. 388, 404 n.11 (1983) (reference to political divisiveness in *Lemon v. Kurtzman* confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools). No doubt any accommodation made by government to the free exercise of religion by believers is politically divisive in the sense that it offends those who believe that such accommodation is an unwarranted toleration. If political divisiviness were the test for entanglement, no governmental accommodation of religion would survive establishment scrutiny. The law is otherwise. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983); *Walz v. Taxi Commission*, 397 U.S. 664 (1970) (tax exemption of Church property does not violate establishment clause).

B.

Primary Effect

Supporting its conclusion that the primary effect of N.J.S.A. 18A:36-4 is to advance and to inhibit religion, the district court reasoned,

> [T]he State has injected itself into religious matters by designating a time and place when children and teachers may pray if they do so in a particular

manner and by mandating conduct by all other children and teachers so that the prayers may proceed uninterrupted in their presence.

While this form of legislation advances the religion of some, it inhibits the religion of others in at least two ways

First, there are those whose religious practices include silent prayer and meditation but who, as an article of faith, believe that the State should have no part in religious matters. For them mandated prayer is no longer prayer . . . . Thus the State, seeking to further religion by mandating certain religious observances, in fact weakens religion by draining vitality from these observances.

. . .

Second, by mandating a minute of silence which permits some persons from engaging in prayer, Bill 1064 prevents other persons from engaging in their kind of prayer . . . . Bill 1064, therefore, mandates an environment which allows some to pray but prevents others from engaging in their form of prayer.

Finally there are those who profess no religion and to whom any form of prayer is offensive. Bill 1064 requires these persons to assume a posture suggestive of particular forms of prayer which are responsive to particular beliefs about ultimate reality.

May v. Cooperman, 572 F. Supp. at 1574-75.

While the district court's analysis of the effects aspect of the *Lemon v. Kurtzman* test presents us with a closer issue than the court's entanglement analysis, we find it flawed as well.

Relying on the testimony of witnesses with theological training, the court found as a fact that "A

short period of group silence at the commencement of the day or at the commencement of an undertaking constitutes one of the traditional forms of prayer of major religious bodies in New Jersey." *Id.* at 1571 (footnote omitted). This finding is not clearly erroneous. Thus for our analysis of the effects issue we will assume that silence is for many pupils the equivalent of prayer. It does not follow, however, that for all pupils that is the case. Moreover, the district court's reasoning seems to be predicated upon an interpretation of the statute as mandating student participation: an interpretation that we have rejected.

The district court's observation that by mandating a minute of silence the legislation "prevents other persons from engaging in their kind of prayer . . ." is a non sequitur. The statute simply does not address the problem of accommodating the beliefs of those whose prayer must be oral or otherwise self expressive. Undoubtedly the school environment requires limitation upon the time, place, and manner of such self expression, even when it is religiously motivated. It is, however, the compulsory school attendance law, not N.J.S.A. 18A:36-4, that "prevents other persons from engaging in their kind of prayer." The challenged statute is a limited exception to the general school regulations, which for educational purposes impose in schools a structured environment in which even religiously-motivated students are required to do the school's thing, and not their own.

That is not to suggest that the practice of observing a moment of silence has no effect upon those pupils who decline to participate in it or those teachers who must permit it. To put the matter in concrete terms, we look at the evidence presented on behalf of Jeffrey May, a plaintiff. May, a high school teacher in the Edison Township school system, and an agnostic, was informed by his school principal that he had to comply with the statute. The principal wrote,

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> The interpretation of [N.J.S.A. 18A:36-4] for our school is as follows. We will observe one minute of seated silence in each homeroom at the very beginning of the opening exercises.
>
> You will note that the Bill says students shall be permitted to observe a minute of silence. That will be interpreted to mean that there will be a minute of silence in the classroom so that each student may use that time as the individual interprets his or her desire to do so. This means that there will be no talking and no movement about the room. Each student will remain seated in his or her seat during the one minute period. At the conclusion of the one minute, students will be asked to rise and participate in the Pledge, and the remainder of the homeroom procedure will continue as in the past.

Exhibit C to Complaint. May refused to implement N.J.S.A. 18A:36-4 and was cited for insubordination. Exhibit C to Complaint. Before any administrative proceedings took place on that charge, he filed this action.

The principal's letter demonstrates the manner in which N.J.S.A. 18A:36-4 may impact upon nonbelieving or otherwise objecting teachers and pupils. His reference in the last quoted sentence to the Pledge is to the exercise mandated in New Jersey by N.J.S.A. 18A:36-3(c) (West 1968).[7] That statute

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7. Every Board of Education shall:

. . .

(c) Require the pupils in each school in the district on every school day to salute the United States flag and repeat the following pledge of allegiance to the flag: "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation, under God, indivisible, with liberty and justice for all," which salute and pledge of allegiance shall be rendered with the right hand

requires the recitation of a pledge of allegiance to the flag, but excuses from that recitation pupils who have conscientious scruples against it. Such pupils are nevertheless required "to show full respect to the flag while the pledge is being given merely by standing at attention. . . ." In *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978), we considered a challenge to the constitutionality of the pledge statute by a pupil who objected to the requirement that she engage in symbolic speech by standing at attention. We held that the requirement that she stand at attention violated her first amendment rights, but that this requirement was severable from the remainder of the statute. Significantly, however, we did not prohibit the exercise because it had the incidental effect of requiring the objecting pupil to remain in her seat and refrain from interrupting the observance of the exercise by others. So, too, with the minute of silence. Compliance with N.J.S.A. 18A:36-4, by permitting willing students to engage in that observance, has the inevitable effect of requiring that other students refrain from interrupting that exercise. The teacher in charge is also required, as a practical matter, to prevent such interruption. If the moment of silence is to be permitted for some, school discipline must in the meantime be maintained for others. Unquestionably the maintenance of such discipline prevents the others from engaging in their own oral or self-expressive

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over the heart, except that pupils who have conscientious scruples against such pledge or salute, or are children of accredited representatives of foreign governments to whom the United States government extends diplomatic immunity, shall not be required to render such salute and pledge but shall be required to show full respect to the flag while the pledge is being given merely by standing at attention, the boys removing the headdress.

N.J.S.A. 18A:36-3(c).

conduct. We hold, however, that a restriction of this kind is valid as a legitimate time, place, and manner regulation. *See, e.g., Perry Education Association v. Perry Local Educators' Association*, 460 U.S.37, 45-46 (1983); *Heffron v. International Society for Krishna Consciousness Inc.*, 452 U.S. 640, 648-52 (1981); *United States Postal Service v. Council of Greenburgh Civil Assns.*, 435 U.S. 114, 132 (1981). We do not hold that the requirements suggested in the principal's letter, that the pupils in homeroom classes remain seated, is the only possible accommodation to the views of nonparticipants. That would depend, we think, upon the structure of each district's educational program. In some districts it may be possible that nonparticipating pupils leave the classroom during the exercise. But the record in this case is simply too incomplete to adjudicate what time, place, and manner accommodations are required.

The district court's observation that the state has injected itself into religious matters by designating a time and place when children and teachers may pray does not in our view satisfy the effects test. The state equally injects itself into religious matters when it designates a time and place when children and teachers may not pray. As we observed with respect to the effect on persons whose prayer takes more expressive forms, some form of time, place, and manner restraint is necessary for the accomplishment of a school's educational mission. So, too, if accommodation to the preferences of those who wish to pray silently is to be made at all, the state must be free to designate when, during the school day, such accommodation shall take place. We conclude, therefore, that the district court erred in finding that the primary effect of the challenged statute is both to advance and to inhibit religion.

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C.

Purpose

The most difficult aspect of the instant case is presented by the legislative purpose feature of the *Lemon v. Kurtzman* formulation. This difficulty is compounded by the Supreme Court's intervening decision in *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). In that case the Court struck down an Alabama statute authorizing a moment of silence at the beginning of each school day because the statute lacked a secular purpose. 105 S. Ct. at 2490. Specifically, the Alabama statute provided,

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which the class is held *may* announce that a period of silence not to exceed one minute in duration *shall* be observed for meditation or *voluntary prayer* and during any such period no other activities shall be engaged in.

Alabama Code § 16-1-20.1 (Supp. 1984)(emphasis supplied). In contrast to N.J.S.A. 18A:36-4, this Alabama statute appears to be optional for teachers, but mandatory for students. It also specifically mentions voluntary prayer. The Supreme Court held that it violated the purpose test of *Lemon v. Kurtzman* because the sole purpose behind its enactment was the endorsement or approval of religion. *Wallace v. Jaffree*, 105 S. Ct. at 2490. In reaching that conclusion the court relied on the testimony of Senator Donald G. Holmes, the prime sponsor of the legislation, that his sole purpose was to reintroduce voluntary prayer in public schools. *Id.* at 2483.

Although the Supreme Court's decision in *Wallace v. Jaffree* was limited to a determination of the

constitutionality of one Alabama statute, in its analysis the Court contrasted and discussed two other Alabama statutes. One of these statutes authorized teachers to lead "willing students" in a designated prayer. Alabama Code § 16-1-20.2 (Supp. 1984). In an earlier opinion the Court had summarily affirmed the judgment of the Court of Appeals for the Eleventh Circuit holding this statute to be unconstitutional. *See Wallace v. Jaffree*, 104 S. Ct. 1704, *aff'g*, 705 F.2d 1526 (11th Cir. 1983).

Another Alabama statute discussed in *Wallace v. Jaffree* provides,

> At the commencement of the first class each day in the first through sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities shall be engaged in.

Alabama Code § 16-1-20 (Supp. 1984). In contrast with N.J.S.A. 18A:36-4, this Alabama statute appears to be mandatory both for teachers and for pupils. Like the New Jersey statute, however, section 16-1-20 omits any specific reference to prayer. The plaintiff in the *Jaffree* case initially challenged the constitutionality of section 16-1-20. At the preliminary injunction stage the district court in Alabama held that it was valid. *Jaffree By ex rel, Jaffree v. James*, 544 F. Supp. 727, 732 (S.D.Ala. 1982). By the time the case reached the Supreme Court the plaintiff had abandoned any claim that section 16-1-20 was unconstitutional. *Wallace v. Jaffree*, 105 S. Ct. at 2481. Thus, technically the Supreme Court did not address the constitutionality of section 16-1-20. In justifying the holding that section 16-1-20.1 was unconstitutional, however, Justice Stevens in the opinion of the Court observed,

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> The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served by § 16-1-20 before the enactment of § 16-1-20.1.
>
> . . .
>
> The Legislature enacted § 16-1-20.1 despite the existence of § 16-1-20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice.

105 S. Ct. at 2491-92 (footnote omitted). Justice O'Connor, concurring, noted that "[b]y mandating a moment of silence, a State does not necessarily endorse any activity that might occur during that period." *Id.* at 2499 (O'Connor, J., concurring). Justice Powell, concurring, observed, "I agree fully with Justice O'CONNOR's assertion that some moment-of-silence statutes may be constitutional, a suggestion set forth in the Court's opinion as well." *Id.* at 2493 (Powell, J., concurring) (footnote omitted). Justice White, dissenting stated that

> [I]n my view the First Amendment does not proscribe either (1) statutes authorizing or requiring in so many words a moment of silence before classes begin or (2) a statute that provides, when it is initially passed, for a moment of silence

> for meditation or prayer. As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer.

Id. at 2508 (White, J., dissenting). Neither Justice Burger nor Justice Rehnquist, who filed separate dissenting opinions, expressed any disagreement with Justice White's appraisal of the status of moment-of-silence legislation.

It is clear, therefore, that in the abstract a statute such as N.J.S.A. 18A:36-4 would not, in the opinion of the Supreme Court, be deemed invalid under the purpose leg of *Lemon v. Kurtzman*. But unlike *Wallace v. Jaffree* the moment of silence statute is not before us in the abstract. The plaintiffs continue to challenge it. They have made a record in support of that challenge, and the district court has made findings as to the legislative purpose. Thus it seems appropriate to take account of Justice O'Connor's observation that "[t]he face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined." *Id.* at 2499 (O'Connor, J., concurring).

In this case the district court found that the statute, although facially neutral, had a religious and not a secular purpose. The court did not find that teachers had encouraged voluntary prayer over other alternative uses of the minute of silence.[8] The finding

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8. Indeed the district court found.

> The experiences of various schools during the weeks when the minute of silence was enforced suggests that some students will use the minute of silence to pray; some will use it to engage in thoughtful meditation; some will tolerate it though considering it boring and

addressed the purpose of the legislature, not of teachers. In reaching that conclusion the district court relied heavily upon evidence suggesting that the silent minute has no legitimate pedagogical value. The legislators' tendered secular purpose -- to provide a transition from nonschool life to school life -- was rejected as pretextual. *May v. Cooperman*, 572 F. Supp. at 1571. Having rejected the one secular purpose tendered by the intervening defendants, the court noted the history in the New Jersey legislature of other less facially neutral efforts to return prayer to the public schools; in particular the previous activities of one sponsor of the instant legislation.

Because we cannot say that this finding by the district court is clearly erroneous,[9] *see* Fed. R. Civ. P. 52(a), we accept the trial court's finding that the legislature's purpose in enacting N.J.S.A. 18A:36-4 was religious, at least to the extent of requiring school

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> stupid: some who believe it violates their religious convictions will nevertheless submit to it, not wishing to risk public ridicule; some who believe it violates their religious convictions will either refuse to observe it or will absent themselves from the place where others are observing it.

May v. Cooperman, 572 F. Supp. at 1572.

9. The legislators contend that the district court's purpose inquiry is flawed in a number of respects. They object particularly, on hearsay grounds, to the admission in evidence of newspaper accounts of statements made by legislators as to their interest in having religion returned to the school. Plaintiffs urge that these newspaper reports were admissible under the omnibus hearsay exception in Rule 803 (24) because they were more probative in showing legislative purpose than any other evidence they could produce through reasonable efforts. This is true, plaintiffs urge, because of the absence in New Jersey of transcripts of legislative proceedings and the district court's pretrial ruling that individual members of the legislature could not be deposed. This evidentiary issue is a difficult one for several reasons. First, the proponents of

districts to accommodate those students desiring the opportunity to engage in prayer at some point during the school day. That, however, is only the beginning of the inquiry. The district court's rejection of the tendered transitional moment secular purpose as pretextual does not compel the conclusion that the state seeks, in Justice O'Connor's words "to encourage voluntary prayer over other alternatives." A purpose of accommodating the religious beliefs of some students is itself a religious purpose, in the sense that absent such beliefs there would have been no reason for the accommodating state action. Given the language of the New Jersey statute which, unlike section 16-1-20 of the

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the evidence have made no showing that nonlegislator witnesses present during legislative sessions were unavailable. Second, the district court's recognition of a legislative privilege not to testify in a case in which legislative purpose is an issue may itself have been an error. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court noted that "[w]hen the issue is simply the interpretation of legislation the Court will look to legislators for guidance as to the purpose of the legislation . . . ." *Id.* at 383. However, the Court went on to say that such an inquiry was limited to a "well-defined class of cases where the nature of the constitutional question requires an inquiry into legislative purpose." *Id.* at 303 n.30. This is such a case. One may question whether the requirements of Rule 803(24) can be satisfied by virtue of such an error.

The appeal will not, however, turn on any alleged error in the admission of hearsay newspaper reports, for there is ample other evidence supporting the district court's conclusion that the purpose of the legislation was not secular but religious. The court's finding that the tendered secular purpose -- the transitional moment -- is pretextual is supported by credited nonhearsay testimony by experts in the educational process. Moreover there was testimony, also credited, by witnesses who attended the Senate and General Assembly Education Committee hearings, suggesting that the primary concern of the legislators supporting the bill was to permit prayer in school. Our examination of the trial court's findings of fact and conclusions of law convince us that its conclusion with respect to the absence of a secular purpose would not have been different had the newspaper clippings been excluded.

Alabama statute, is permissive for students, and the record evidence, we do not believe a finding that the religious purpose was to encourage prayer over other alternatives, rather than to accommodate those wishing to pray, would be sustainable.

Thus the question presented by this appeal narrows to this: May the state, acting through the legislature or through a school board or through an individual teacher, take action in the school setting that, while not endorsing prayer in preference to other forms of silent activity, provides for a minute of silence for the purpose of permitting prayer by those who want to pray. We do not find any clear answer in *Wallace v. Jaffree*. Nevertheless, while there was no finding in *Wallace v. Jaffree* that the Alabama statute was enacted for the purpose of accommodating prayer, there is also no indication that the secular purpose requirement of the *Lemon v. Kurtzman* test turns on the mandatory as opposed to permissive nature of a statute. Indeed, in contrasting different Alabama statutes, the Court specifically noted that while earlier statutes were mandatory for teachers the statute it was considering was permissive. This distinction, however, was of no relevance to the Court's constitutional analysis. *See Wallace v. Jaffree*, 105 S. Ct. at 2491. Moreover, in the recent case of *Thornton v. Caldor, Inc.*, 105 S. Ct. 2914, 2917 (1985), the Court applied the *Lemon v. Kurtzman* test to strike down a Connecticut statute that was designed to accommodate religious views.[10] Accordingly, because the Supreme Court has expressly required a secular

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10. In *Thornton v. Caldor* the Court concluded that a Connecticut statute, which provided private sector employees with an absolute right not to work on their designated Sabbath, violated the establishment clause. 105 S. Ct. at 2918. Significantly, the Court did not seem to believe that the accommodating purpose of the Connecticut statute made any difference in the Court's establishment clause analysis. *See id.* at 2917.

purpose when considering a constitutional challenge under the establishment clause and because the district court made a finding that N.J.S.A. 18A:36-4 lacked such a secular purpose, we hold the New Jersey statute to be unconstitutional under the first amendment.

III.

The legislators also appeal from the district court's declaratory judgment that fees may be assessed against them. Since, however, no amount of fees had been fixed, that declaratory judgment is interlocutory. *See Bandai America Inc. v. Bally Midway Mfg. Co.*, No. 84-5884, 85-5355 (3d Cir. Oct. 10, 1985)); *West v. Keve*, 721 F.2d 91, 94-97 (3d Cir. 1983); *DeLong Corp. v. Raymond International Inc.*, 622 F.2d 1135, 1138-39 (3d Cir. 1980). Although the district court subsequently fixed a fee amount, the legislators appealed from the declaratory judgment and not the subsequent judgment awarding an actual fee amount. Thus that appeal must be dismissed.

V.

The declaratory judgment that N.J.S.A. 18A:36-4 is unconstitutional will be affirmed. The appeal from the declaratory judgment that the legislators are liable for attorneys fees will be dismissed.

Appendix A

BECKER, *Circuit Judge*, dissenting:

The district court held that the New Jersey minute of silence statute, New Jersey P.L. 1982 Ch. 205, was unconstitutional because it violated all of the elements of the three-part disjunctive test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): (1) it did not have a secular purpose, (2) its primary effect both advanced and inhibited religion, and (3) it fostered excessive governmental entanglement with religion by promoting divisiveness among religious groups. 572 F. Supp. 1561, 1572-76 (D. N.J. 1984). A majority of this panel disagrees with the district court on the second and third points: it finds neither impermissible effect nor excessive entanglement. Majority Op. at ___. With these conclusions I have no quarrel.

Although the majority agrees with the district court that the animating legislative purpose is religious, it reaches this conclusion by an analysis different from that relied upon by the district court. Unlike the district court, the majority interprets the statute to permit, rather than to mandate, student prayer. This reading I believe to be correct. Because of the permissive nature of the statute, the majority concludes that the legislative purpose was not to encourage prayer over other activities, but to accommodate those students who wish to pray in school. Its decision thus turns on the requirement of that the legislature have a secular purpose even when it accommodates religion. The majority holds this accommodation unconstitutional because it accepts the district court's finding that the statute lacks a secular purpose. I respectfully dissent from this holding.

In my view, a permissive and facially neutral statute such as this is presumptively constitutional. This view is supported not only by common sense, but also by statements in *Zorach v. Clausen*, 343 U.S. 306

(1952), and in several of the opinions in *Wallace v. Jaffree*, ___ U.S. ___, 105 S. Ct. 2479 (1985). I also believe that the presumption becomes a strong one where, as here, the panel has concluded that the statute has no impermissible effect and fosters no excessive governmental entanglement with religion. As I see it, under these circumstances, only extremely clear proof that the law is devoid of a secular purpose would justify our holding it unconstitutional; such proof was not produced in this case.

Second, I believe that the majority applied an incorrect standard of review when it deferred to the findings of the district court. *Bose Corp. v. Consumers Union*, ___ U.S. ___, 104 S. Ct. 1949 (1984), dictates that our review in this first amendment case be plenary. Under a plenary review standard, after analyzing the evidence of purpose adduced at trial (and bearing in mind the permissive nature of the statute), I conclude that the statute has a legitimate secular purpose, hence is not infirm. Finally, even under a deferential standard of review, I would not accept the district court's purpose finding because it is unsupported by the admissible evidence. Accordingly I would reverse the judgment of the district court.

In the ordinary course I would commence my discussion with these grounds for reversal. Here, however, in light of what I believe to be the flawed accommodation analysis that informs the majority's position, I shall discuss the accommodation issue first. Unlike the majority, I do not believe that a statute accommodates religion when it lifts no pre-existing impediment to religious exercise and when, in fact, it creates the alleged religious practice in question. The majority, in the exercise of describing the minute of silence statute as religious, has mistaken the permissive nature of the enactment for an active accommodation of religion. I engage in this discussion

of accommodation because this defect is central to the majority's argument, because it emphasizes the unlikelihood that this statute is unconstitutional, and because it is important to identify the confusion in the jurisprudence about the concept of accommodation. As a preface to this accommodation discussion -- and to the opinion itself -- I shall explain in a fashion somewhat different from that employed by the majority, why the statute is permissive.

I. *NATURE OF THE STATUTE*

A. *The Permissive Nature of the Statute*

The statute provides:

> Principals and teachers . . . shall permit students to observe a 1 minute period of silence to be used at the discretion of the individual student, . . . for quiet and private contemplation or introspection . . . .

It is apparent from the face of the statute that the only mandatory word, "shall," is directed at principals and teachers. The language applicable to students is, by contrast, permissive: the minute is to be used "at the discretion of the individual student." Presumably, this language means that students may read, or listen through earphones to radios or tape cassettes, or be excused from class during the minute of silence. As the majority's review demonstrates, *see* Majority Op. at ___, prior drafts of the minute of silence statute and the legislative history of this version fully support the conclusion that, insofar as student participation is concerned, the law is permissive only.[1]

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1. The tape of a segment of a CBS news program that was placed into evidence provides further proof, if any were needed, that the statute mandates no particular behavior on the part of the students. The tape depicted the experience of

Of course, students who are so disposed may engage in silent prayer during the minute of silence. But this activity occurs only because the statute *allows* the students to use the minute of silence at their discretion; the statute neither requires nor encourages prayer. The statute refers to "quiet and private contemplation or introspection." While these activities may outwardly resemble prayer, they frequently involve quite different attitudes of mind. "Prayer," and "private contemplation or introspection," are not synonymous.

Like the majority, therefore, I interpret the statute as permitting, but not coercing, prayer. The majority proceeds to characterize this permissive law as a governmental accommodation of religion. I have strong reservations about the majority's accommodation analysis.

B. *Accommodation of Religion?*

The majority reasons that by providing a minute of silence at the beginning of the school day, the government accommodates those students who wish to pray. Because of the neutrality of the statute and the absence of any pre-existing governmental impediment to silent prayer in schools, I disagree with the interpretation of the statute as an accommodation of religion. Moreover, I have doubts as to whether a statute that creates the purported religious observance

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the public schools in Sayreville, New Jersey, after the enactment of the challenged statute. An actual minute of silence was shown during which students' attitudes and behavior were far from uniform. Their posture can only be described as that of studied irreverence. *Cf.* Wallace v. Jaffree, 105 S. Ct. 2479, 2495 n.9 (Powell, J., concurring) ("Given the types of subjects youthful minds are primarily concerned with, it is unlikely that many children would use a simple 'moment of silence' as a time for religious prayer. There are too many other subjects on the mind of the typical child.")

can be viewed as an accommodation of religion. While I do not accept the majority's accommodation analysis, the concept of accommodation is murky enough that I admit that the majority's approach *may* be correct. As I have explained, *see supra* at p. 3. it is important for several reasons to clarify the problems with the majority's accommodation analysis, not the least of which is that the majority's resort to the unclear concept of accommodation suggests that this statute is not religious *at all*, and how unlikely it is that it is unconstitutional.

Government accommodation of religion, as opposed to mere tolerance, has been *approved* by the Supreme Court, at least where there is some secular purpose of the governmental practice. *See Lynch v. Donnelly*, ___ U.S. ___, 104 S. Ct. 1355, 1359 (1984). While its contours are not entirely clear, an accommodation seems to consist of the lifting of a barrier to religious observance. Thus, without a release time program, public school attendance requirements would interfere with religious instruction classes. *See Zorach v. Clauson*, 343 U.S. 306 (1952). In his opinion of the Court in *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985), Justice Stevens recognized that a burden on religious exercise exists prior to a government accommodation of religion. He pointed out that at the time of enactment of the Alabama statute under consideration, "there was no governmental practice impeding students from silently praying for one minute at the beginning of each school day; thus, there was no need to 'accommodate' or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause." *Id.* at 2491 n.45.

In her opinion in *Wallace, supra*, Justice O'Connor also described accommodation as a lifting of a governmental impediment to religious practice. 105

S. Ct. at 2505. She concluded that "the Alabama statute at issue today lifts no state-imposed burden on the free exercise of religion, and accordingly cannot properly be viewed as an accommodation statute." *Id.* Similarly, prior to the enactment of the New Jersey minute of silence statute, there was "no governmental practice of impeding students from silently praying for one minute at the beginning of each school day." Under the analysis of two Justices in *Wallace, supra*, therefore, the statute cannot be considered an accommodation.

Moreover, I doubt that accommodation analysis is appropriate when the religious interest in question is created by the very statute that accommodates it. Until the adoption of the minute of silence statute, there was no formally established quiet time during which students in public schools could pray. Thus, the allegedly offending practice -- praying during silent time at school -- was created by the statute. When it concludes that the statute is a governmental accommodation of religion, the majority engages in bootstrapping. The minute of silence statute does not allow for the observance of a pre-existing religious interest, as did, for example, the release time program for religious training approved in *Zorach*. And, if the statute provides for any religious activity at all, it provides for a *new* religious activity; hence, it cannot be said to accommodate an existing one.

There is a potential flaw in the foregoing analysis, one stemming from *Lynch, supra*. It is possible to read *Lynch* as approving the use of accommodation analysis where the religious interest is created by the statute or governmental practice in question and where there was no pre-existing burden to religious observance. The Court in *Lynch* treated Pawtucket's practice of displaying a nativity scene as an accommodation of religion even though the challenged governmental

practice arguably created the religious interest it accommodated, *i.e.*, the interest in viewing the nativity scene. Looking at the problem differently, one might say what was accommodated was not the specific interest created by the government, but rather the more general American religious heritage. Under either interpretation of *Lynch*, the minute of silence statute can be viewed as an accommodation of religion.

Moreover, it is not clear that the nativity display challenged in *Lynch* removed a pre-existing impediment to religious exercise. In fact, if the religious interest that the Pawtucket display accommodated was created by the display itself, there could have been no pre-existing impediment to religious exercise because there was no exercise to impede. Had the municipality not erected a nativity scene, there would have been no governmental impediment to citizens setting up their own creches, although these nativity scenes would require some expenditure of money by individual citizens. More to the point, the *Lynch* Court never considered the existence of any impediment to religious observance in the absence of the municipal nativity scene.[2]

Despite *Lynch*, which is, after all a very different kind of case, I am skeptical about the majority's characterization of the statute as an accommodation of religion. I believe that my colleagues confuse the

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2. I note that Chief Justice Burger characterized the moment of silence statute at issue in *Wallace* as an accommodation of religion. *Wallace*, *supra*, 105 S. Ct. at 2507-08 (Burger, C.J., dissenting). It is significance that Justice Stevens' discussion in *Jaffree* of a pre-existing impediment requirement mentions only "our cases interpreting the Free Exercise Clause." Governmental impediments to religious observance are at the core of free exercise claims. However, Justice Stevens ignores *Lynch*, in which accommodation analysis was used to dispose of a claim that the government had violated the Establishment Clause.

permissive nature of the statute with an active accommodation of religious activity. Because the statute is permissive and facially neutral, the majority understandably has difficulty ascribing a religious nature to it. The only way it can do so, it seems, is by considering the law an accommodation of religion (although, ironically, accommodations of religion have been held *constitutional* by the Supreme Court). The problems with the majority's accommodation analysis emphasize the need for clarification of this area by the Supreme Court. Moreover, the fact that the majority was forced to turn to accommodation in order to ascribe a religious nature to a permissive, facially neutral statute emphasizes how unlikely it is that such a statute is unconstitutional.

C. *The Presumption of Constitutionality*

As we have seen, the statute is permissive and facially neutral, i.e., it makes no mention of religion. In my view, such a statute is presumptively constitutional.[3] When the state has neither given support to a religious group nor enforced any religious observance, it can hardly be said to have established a religion. As I see it, only very strong proof of excessive entanglement, of impermissible effects, or of the absence of any secular purpose will serve to invalidate such a statute.[4] Statements in *Zorach*, *supra*, and *Wallace*, *supra*, underscore the unlikelihood that such a statute will be unconstitutional.

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3. I speak of presumptions not in a technical sense, relating to the parties' burden of proof, but in a broader sense in which it means that such a statute is *probably* constitutional.

4. In this case, the majority has found that the statute has no impermissible effects and does not foster governmental entanglement with religion. Thus, as noted *supra*, the presumption of constitutionality is particularly strong, for it is most unlikely that such an enactment has a purely religious purpose.

Appendix A

In *Zorach*, the absence of governmental coercion indicated to the Supreme Court that a school that released students during the day for religous study violated neither the Establishment nor the Free Exercise clauses. The Court's reasoning was clear, and its holding unequivocal:

> No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. he is left to his own desires as to the manner or time of his religious devotions, if any.
>
> There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence on the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, it it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.

343 U.S. at 311 (footnotes omitted). The lesson of *Zorach*, then, is that so long as authorities do not force students to participate, the authorities may allow and provide time and room for voluntary religious participation.

The *Zorach* reasoning applies directly to the statute at issue here. No student is forced to observe a minute of contemplation, much less prayer. Each student is left to his or her own desires as to how to use that time, and the state is neutral. The statute does no

more than provide students who wish to pray silently with an opportunity to do so undisturbed by noise.

At least one other case supports the proposition that moment of silence statutes that are permissive and facially neutral presumptively have a secular purpose. In *Abington School District v. Schempp*, 374 U.S. 203, 281 (1963) (Brennan, J., concurring), Justice Brennan said that "the observance of a moment of reverent silence at the opening of the class [may serve] the solely secular purposes of devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." (quoted in *Wallace, supra*, 105 S. Ct. at 2499 (O'Connor, J., concurring)).

The vitality of such reasoning has recently been reaffirmed in *Wallace*, which, like the instant case, involved a moment of silence statute. The statute at issue in *Wallace* gave each teacher the discretion to announce a period of silence in her or his classroom; however, if the teacher did impose the minute of silence, the students were *required* to pray. The Supreme Court found the statute unconstitutional. In doing so, the Court gave clear indication that a statute that did not require, but merely permitted, a student to pray, would be constitutional.

In his opinion for the Court, in which Justices Brennan, Marshall, and Blackmun joined, Justice Stevens explicitly distinguished the statute before the Court from a statute, like the one before us, that allows students opportunity to pray but does not mandate prayer:

> The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an

> appropriate moment of silence during the school day.

Id. at 2491. I believe it to be implicit in this discussion that statutes that "merely protect[] every student's right to engage in voluntary prayer" carry a strong presumption of constitutionality.

The concurring and dissenting opinions in *Wallace, supra*, lend further support to this view. In her concurring opinion, Justice O'Connor stated that "[b]y mandating a moment of silence, a State does not necessarily endorse any activity that might occur during that period." *Id.* at 2499 (O'Connor, J., concurring). This statement is a reaffirmation of the *Zorach* principle as applied to moments of silence: if the legislation allowing for such moments does not endorse religious activity, it is not unconstitutional. And Justice Powell observed that he would "vote to uphold the Alabama statute if it also had a clear secular purpose" in addition to the religious purpose for which it was enacted. 105 S. Ct. at 2495. The citation he used to support this statement implies that he would discern secular purpose from the face of some statutes. He said, "See *Mueller v. Allen*, ___ U.S. ___, ___, 105 S. Ct. 3062, ___, 77 L.Ed.2d 721 (1983) (the Court is 'reluctan[t] to attribute unconstitutional motives to the state, particularly when a plausible secular purpose may be discerned from the face of the statute')." *Id.* I believe that the text of the statute, reflects a clear secular purpose, *i.e.*, the providing of a moment of calm before the beginning of classes. *See also infra* pp. 30-31.

In their dissenting opinions in *Wallace*, Chief Justice Burger and Justice White emphasized the absence of coercion as a reason for holding the Alabama statute unconstitutional. The Chief Justice described the statute in *Wallace* thus: "Without

pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes -- as Congress does by providing chaplains and chapels." 105 S. Ct. at 2507-08 (Burger, C.J., dissenting). He went on to state, "[i]f the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the 'benevolent neutrality' that we have long considered the correct constitutional standard will quickly translate into the 'callous indifference' that the Court has consistently held the Establishment Clause does not require." *Id.* at 2508.

According to Justice White, "if a student asked whether he could pray during [the moment of silence], it is difficult to believe that the teacher could not answer in the affirmative." *Id.* (White J., dissenting). This suggests, I think, that Justice White would consider a statute constitutional if it permitted but did not require, prayer.

The *Wallace* opinions also emphasize how improbable it is that a permissive, facially neutral statute will fail the effects test of *Lemon*. In his concurring opinion, Justice Powell stated that "the 'effect' of a straighforward moment-of-silence statute is unlikely to 'advanc[e] or inhibi[t] religion'." 105 S. Ct. at 2495. Justice O'Connor provided a lengthier explanation of why a mere minute of silence, without any encouragement to pray, passes the effect test of *Lemon*. She stated:

> First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is

> not compelled to listen to the prayers or thoughts of others . . . . It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

105 S. Ct. at 2498-99. Under this reasoning, it is hardly possible to hold that the statute challenged here has the effect of advancing or inhibiting religion. And, indeed, the majority has conceded that the New Jersey minute of silence has no unconstitutional effect.

Logic, precedent, and the writings of a majority of the Justices suggest that a permissive, facially neutral statute such as the New Jersey moment of silence law, which has no impermissible effects and fosters an impermissible entanglement, carries with it a strong presumption of constitutionality which only the clearest proof of an absence of secular purpose can vitiate. With the nature of the New Jersey statute in mind, I turn to an analysis of its purpose, the ground upon which the majority finds the law unconstitutional. As I demonstrate in part II, clear proof of the absence of a secular purpose is surely lacking here.

II. *THE STATUTE'S SECULAR PURPOSE*

The majority affirms the holding of unconstitutionality, because it believes that it cannot overturn the district court's finding that the statute lacks a secular purpose. I believe that the majority proceeds under an erroneous standard of review. I shall first explain why I believe that *Bose Corp. v. Consumers' Union*, ___ U.S. ___, 104 S. Ct 1949 (1984), requires that our standard of review in this case should be plenary. Next, I shall engage in plenary review of the evidence bearing on legislative purpose, and explain why I believe the evidence shows that the statute had a secular purpose. Finally, I shall

demonstrate that even under a deferential standard of review, the district court's purpose finding is unsupportable.

A. *The Relevance of* Bose.

In *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949 (1984) the Supreme Court held that an appellate court is required to exercise plenary review of a lower court's finding of actual malice in a libel case. The majority would apparently limit *Bose* to its facts, exercising plenary review only in libel or defamation cases. I believe that this limitation represents a misreading of *Bose*. *Bose*'s language and reasoning were broad; it drew from precedents in a number of first amendment cases. Because I read *Bose* as a statement about the role of appellate courts in first amendment cases generally, I believe that it dictates our scope of review here.

The *Bose* determination of whether a speaker or writer had "actual malice," like the determination of whether a legislature had a secular purpose, is a factual question concerning intent. Because it is a factual question, Fed. R. Civ. P. 52(a) would appear to require federal appellate courts to review district court's findings on the matter under a deferential standard. In *Bose*, however, the Court held that as a matter of constitutional law, plenary review was required:

> The requirement of independent appellate review . . . is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form in our common law heritage. It reflects a deeply held conviction that judges -- and particularly members of this Court -- must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.

104 S. Ct. at 1965. In my view, this language is applicable to *any* findings of a district court that implicate a party's first amendment interests. Indeed, the Court arrived at its position in *Bose* after a lengthy review of first amendment cases. It pointed out that it had exercised plenary review in cases involving libel, fighting words, incitement to riot, obscenity and child pornography. *Id.* at 1961-63.

Although the majority in this case apparently would have it differently, the Court regarded *Bose* not as an aberration but as an imperative of first amendment principles and jurisprudence. Plenary review is necessary to protect the delicate balance that the first amendment entails. As the Court explained, "[p]roviding triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Id.* at 1962 (footnote omitted). Under *Bose*, plenary review is appropriate in a first amendment case whenever important "constitutional facts" are at issue, that is, whenever the district court's findings of fact presuppose a legal standard and have potentially grave effects on first amendment rights. The Supreme Court has recently stated this general principle: "Where, for example, as with proof of actual malice in First-Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *Miller v. Fenton*, 54 U.S.L.W. 4022, 4025 (1985). *See also Bender v. Williamsport Township*, 741 F.2d 538, 542 n.3 (3d Cir. 1984) ("in the area of 'constitutional fact,' an appellate court is

free to draw its own inferences from the record"), *cert. granted*, ___ U.S. ___, 105 S. Ct. 1167(1985).[5]

It should be clear that plenary review is appropriate in this case. Whether the statute had a permissible purpose is an important constitutional fact, for permissibility is determined by a legal standard and potentially grave effects on first amendment rights are at stake. Indeed, as noted above, the fact at issue here is similar to the one at issue in *Bose* in that both the determination of actual malice and that of secular purpose involve inquiries into states of mind, guided by complicated legal standards. Distinguishing what is religious from what is secular is a process as overlaid with constitutional considerations as deciding the difference between protected and unprotected speech. The principles that underpin *Bose* are thus equally forceful here.

To complete my argument in favor of plenary review, I will consider here two distinctions that one might arguably draw between the instant case and *Bose* and explain why I believe that neither is material. First, one might argue that *Bose* should be limited to cases where an appellate court reviews decisions *denying* assertions of first amendment rights, whereas the district court's decision in this case arguably upholds the expressive rights of citizens. I do not believe, however, that the scope of review in first amendment cases is determined by which side is favored by the district court. The appellate court's concern should be to draw first amendment

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5. That *Bender* involved appellate review of a summary judgment record whereas we have a full record in this case replete with factual disputes is not material. There was a disputed factual record in *Bose*. The appellate court's responsibility to exercise plenary review is constant no matter how the case before it arose; the inferences may be drawn from disputed as well as from undisputed records.

boundaries *correctly*, not to favor one side over the other. Moreover, in its extensive summary of cases, *see* 104 S. Ct. at 1961 - 63; *supra* at 15-16, the *Bose* Court cited cases in which the lower court had both upheld and denied first amendment claims; the Court did not distinguish between the two sets of cases. Thus, the first arguable distinction is simply not tenable.

Second; one might argue that *Bose* should be limited to cases involving speech, and perhaps to cases involving free exercise claims, but should not be extended to establishment cases. This position requires the implicit assumption that plenary review is more important when freedom of speech (or free exercise of religion) is at issue because an erroneous determination that speech (or religious exercise) is unprotected inhibits the expression of individuals' ideas and thus impairs personal freedom. To make explicit this assumption is to reveal its falsity, for one of the most fundamental of the Founding Fathers' tenets was that individuals must be free from governmentally imposed religion. The constitutional prohibition of established religion is surely as important as the guarantee of freedom of speech.[6]

In the next section, I shall examine under a plenary standard of review the evidence relating to the purpose of the statute.

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6. Indeed in Bob Jones University v. United States, 461 U.S. 574 (1983), decided a year before *Bose*, the Supreme Court reviewed the district court's determination whether an institution's purpose was primarily educational or religious under a plenary standard of review. *See also* Presbyterian & Reformed Publishing Co. v. Commissioner of Internal Revenue, 743 F.2d 148, 158 n.9 (3d Cir. 1984) (Tax Court's determination that a publishing house was not sufficiently connected with a church to qualify for tax-exempt status was not entitled to deferential standard of review); *Cf.* Bender v. Williamsport Township, 741 F.2d 538 (3d Cir. 1984) (plenary review of whether speech was secular or religous).

Appendix A

B. *Evidence of Legislative Intent*

The evidence presented to the district court may be classified in five categories: testimony of three witnesses who were present at legislative hearings; newspaper accounts of the hearings; evidence of the perceptions of various citizens and citizens' groups of New Jersey about the statute's purpose; expert testimony about the pedagogical value of the statute; and seventeen prior bills proposing moments of prayer or moments of silence. I shall consider these in turn, and also consider one final piece of evidence of legislative purpose, the text of the statute itself.

1. Three people who attended the legislative hearings testified to legislators' statements concerning the religious purpose of the statute. Although the statute was debated by the full assembly and the full senate, the witnesses mentioned only two assembly members who ever referred to religion: Ms. Rhodes and Mr. Chuman repeated statements reflecting a religious purpose made by Assemblyman Zangari, and Reverend Sarfarty described a similar remark make by Assemblyman Adubato.

This evidence is simply insufficient to support a finding of a religious intent on the part of the legislature. In the first place, given its paucity, the evidence is at best underwhelming. Two assemblymen cannot be said to speak for the intent of the entire assembly and senate. *See United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."). Yet there is no evidence on the record that any other assemblymember or senator had a religious purpose in mind. More importantly, even this testimony is equivocal because each of the witnesses also testified to legislators' statements that the statute

had a secular purpose.[7] Because we may not invalidate a statute that has *a* secular purpose, *Lemon, supra*, 403 U.S. at 611; *see also Wallace*, 105 S. Ct. at 2490, testimony that reveals both a religious and a secular purpose cannot support a finding of unconstitutionality.[8]

2. The district court also relied on newspaper articles describing the legislative hearings on the statute. Because the New Jersey legislature does not keep a record of its hearings and debates and because the district court excused the legislators from

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7. Mr. Chuman's testimony on the point was as follows:

QUESTION: You said you heard Senator -- or Assemblyman -- James Zangari testify?
ANSWER: Yes.
QUESTION: Do you recall what he stated -- was he in favor of the adoption of this law?
ANSWER: Oh, very much so.
QUESTION: Did he state his reasons?
ANSWER: Well, yes he did. he thought that the moment of silence would be useful in the schools and would serve an educational purpose.
QUESTION: What purpose?
ANSWER: Educational purpose.
QUESTION: A teaching purpose?
ANSWER: Yes.
QUESTION: Did he expand on that and say in what way?
ANSWER: he may have, but I don't recall.

Ms. Rhodes and Reverend Sarfarty recounted statements by other legislators that described the minute of silence as an opportunity for the students to collect their thoughts and prepare for the day's learning and as an aid in the creation of discipline and order.

8. By contrast, in *Wallace*, the testimony of Senator Holmes, the sponsor of the bill concerning the religious purpose of the moment of silence, was unrelieved by statements concerning a secular purpose.

testifying about their motives in enacting the statute,[9] the district court found that there was sufficient necessity to admit the articles under the residual hearsay exception, Fed. R. Evid. 803(24).[10] The

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9. The majority states that "the district court's recognition of a legislative privilege not to testify in a case in which legislative purpose is an issue may itself have been an error." *See supra* at ___ n.9. For support of this view, it relies upon United States v. O'Brien, 391 U.S. 367 (1968), in which the Supreme Court stated that it would look to statements by legislators for guidance "in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose." *Id.* at 383 n.30. However, the *O'Brien* Court was not referring to depositions or other testimony taken from legislators, but to statements contained in the official record of the legislative proceedings. In my view, the district court acted fully within its discretion in refusing to allow the plaintiffs to depose New Jersey legislators. Although the testimony in question does not fall within the provisions of either the federal or the state constitution, there may well be a common-law speech and debate privilege that protects the legislators in this situation. At all events, it would be unseemly to parade legislators before the court to testify about their intentions in enacting a statute, and, more important, the reliability of such testimony would be highly suspect. Legislators, concerned that the statute might be held unconstitutional, could view their intentions differently in hindsight. As Justice O'Connor stated in Wallace v. Jaffree, 105 S. Ct. at 2500 ("[i]t is particularly troublesome to denigrate an expressed secular purpose due to post-enactment testimony by particular legislators . . . ."). Thus, even if there is no common-law privilege, such testimony would be subject to a ruling that it is inadmissible under Rule 403, for its probative value is substantially outweighed by the danger that it will be inaccurate and therefore confuse the issues.

10. Ordinarily, when offered to prove the truth of the matters stated therein, newspaper articles are held inadmissible as hearsay. *See, e.g.*, Pallotta v. United States, 404 F.2d 1035 (1st Cir. 1968); Poretto v. United States, 196 F.2d 392 (5th Cir. 1952); De La Cruz v. Dufresne, 533 F. Supp. 145 (D.

newspaper reports admitted suggested that the purpose behind the statute was to return prayer back into the public schools, surreptitiously.

There are two problems with the newspaper evidence. First, I do not believe that the newspaper accounts satisfy the requirements for admission of Fed. R. Evid. 803(24).[11] That section reads, in relevant part, as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (24) *other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statment is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of

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Nev. 1982). Robert Stigwood Group v. O'Reilly, 346 F. Supp. 376 (D. Conn. 1972), *rev'd on other grds.*, 530 F.2d 1096, *cert. denied*, 429 U.S. 848 (1976); United States v. Crocker-Anglo National Bank, 277 F. Supp. 133, 183 n.36 (1967). See also Annot., *Admissibility of Newspaper Articles as Evidence of the Truth of the Facts States Therein*, 55 ALR3d 663. These authorities do not discuss the applicability of Rule 803(24), however.

11. The majority, too, had some doubts about the admissibility of these documents. *See* Maj. Op. at ___. The majority concluded, however, that if the evidentiary ruling was indeed error, it was harmless because there was ample other evidence supporting the trial court's conclusion that the legislative purpose was religious.

justice will be served by admission of the statement into evidence.

The legislative history of the Rule indicates that it was to be narrowly construed and invoked only sparingly. *See* S. Rep. No. 1277, 93d Cong. 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News, pp. 7051, 7056; H.Conf.Rep.No. 1597, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. & Admin. News, pp. 7051, 7106. *See also In re Japanese Electronics Products*, 723 F.2d 238, 302 (1983) ("We note, moreover, that those exceptions are intended to have a narrow focus."); *United States v. Bailey*, 581 F.2d 341, 346-47 (3d Cir. 1978); *Robinson v. Shapiro* 646 F.2d 734, 742 (2d Cir. 1981); *Huff v. White Motor Corp.*, 609 F.2d 286, 291 (7th Cir. 1979).

It is clear that two of the explicit prerequisites of Rule 803(24) were not met. As the majority has observed, Maj. Op. at ___, n.9, the plaintiffs made no showing of inability to locate observers who attended the legislative debates about the statute and three of them in fact testified. The live testimony of these witnesses was far preferrable to newspaper accounts of the debate, and, while the plaintiffs might have been able to get the names of additional observers through reasonable efforts, they made no effort to do so. *Cf. Debra P. by Irene P. v. Turlington*, 730 F.2d 1405 (11th Cir. 1984) (consulting firm's report admitted pursuant to 803(24) only after a showing that there was no better available evidence). Thus, the newspaper clippings did not satisfy the 803(24)(B) requirement that the evidence be more probative than any other evidence that the plaintiffs could have procured through reasonable efforts.

Nor did the clippings have the requisite "circumstantial guarantees of trustworthiness." Courts admitting evidence under 803(24) require some showing that "the declarant's perception, memory,

narration, or sincerity," are reliable. *United States v. Friedman*, 593 F.2d 109, 119 (9th Cir. 1979).[12] Under this standard, the newspaper reports are of dubious validity. On the basis of the record, we do not know *anything* about the reliability of the articles; perception, memory, narration, and misrepresentation all present potential problems. The reporters may have been present for only part of the hearings they reported, and may not correctly have remembered or interpreted the speeches they heard. They may have simply recorded their impressions of the hearings, in which case the clippings would provide only very slender evidence of legislative intent. We have no idea of the amount of editorializing that went into the articles, which could have been written from a biased point of view. It is not unknown for reporters to stretch some facts or omit others in order to arouse public indignation.[13]

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12. *See also* Weinstein & Berger, *Evidence* ¶803(24)(1): "Such factors as the nature -- written or oral -- and character of the statement, the relationship of the parties, the probable motivation of the declarant in making the statement, and the circumstances under which it was made must be assessed. Also significant are the knowledge and qualifications of the declarant." (Footnotes omitted.)

13. *Cf. Pittsburgh Press Club v. United States*, 579 F.2d 751, 759-60 (3d Cir. 1978) (ruling a survey inadmissible under Rule 803(24) because it "lacked the necessary safeguards of accuracy and flexibility") The court stated that "[i]n the context of polls and surveys, the circumstantial guarantees of trustworthiness are for the most part satisfied if the poll is conducted in accordance with generally accepted survey principles, and if the results are used in a statistically correct way, since proper survey and statistical methods are intended to assure a poll's reliability." *Id.* at 758. Not only are there no comparable generally accepted principles of reporting, so that the entire process is less reliable than poll-taking, but we also know nothing of the methods or motivations of the reporters who wrote the articles that were admitted into evidence.

I thus conclude that the newspaper accounts were inadmissible.[14]

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14. This conclusion is unaffected by Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961), relied upon by appellees. In *Dallas County*, which was decided before the adoption of the Federal Rules of Evidence, the court held a newspaper article admissible under Fed. R. Civ. P. 43(a), using the kind of approach later codified in Rule 803(24). The reasons the court gave for finding that the article met the hearsay requirements of necessity and trustworthiness are not present in this case. The article in *Dallas County* was more probative than any other evidence that could be obtained through reasonable efforts because the fire it described had occurred fifty-eight years before the trial. 286 F.2d at 396. Indeed, the *Dallas County* court went on to state that the rationale behind the "ancient documents" exception to the hearsay rule was applicable to the newspaper article in question. *Id.* Unlike the fifty-eight-year-old article at issue in *Dallas County*, the newspaper clippings admitted in this case cannot even be considered ancient documents, for under Fed. R. Evid. 803(16), an ancient document is twenty years old.

Similarly, the *Dallas County* court's analysis of trustworthiness does not necessarily apply the articles admitted in this case. The article admitted in that case described a fire in a public building in a small town, an event that a reporter could not fabricate without embarrassment. Unlike a fire in a public building, the statements of New Jersey legislators at hearings concerning the bill are not facts of such a public nature that they would be generally known throughout the community. While it might be inconceivable that a reporter would state that legislative hearings occurred when in fact they did not, it would not be inconceivable that he or she might, either consciously or unconsciously, give a skewed or one-sided account of what was said at the hearing. Fear of embarrassment is not such a powerful guarantee of truthfulness in this case, both because the nature of the material reported is more subjective and because the reporters were not writing for small, close-knit communities.

The second problem with the newspaper evidence is that, even if the accounts were admissible, they are ambiguous at best in establishing that the legislature had forbidden motivations in passing the statute. The newpaper accounts contain descriptions of legislators' secular purposes, as well as statements about returning prayer to the schools. For example, one article on which plaintiffs rely quoted Assemblyman Zangari as saying, *inter alia*, that "regardless of what some people say, this is not a prayer bill. Rather it allows each student to participate in a one-minute period of voluntary silence to be used at his or her own discretion." *The Star Ledger*, P. ___, col. ___, Oct. 25, 1982. It appears to me that this is clear evidence of a *secular* purpose that the majority and the district court have ignored.

3. Another source of evidence of religious purpose is citizens' perceptions of the statute. Proceeding under the theory that "[i]t is significant what those who opposed the Bill conceived its purposes and effects to be, because in many instances they were among those most directly affected by it," *May v. Cooperman*, 572 F. Supp. at 1565, the district court considered reaction to the statute by the Ethical Culture Society of Bergen County, the New Jersey School Board Association, the American Baptist Churches of New Jersey, the New Jersey Education Association, and several parents of public school students.

I believe that this evidence is very weak. Community perception is simply too amorphous and unreliable to provide the ground for constitutional decisions. The opinions and perceptions of the community are shaped by many factors -- editorials, personal biases, gossip, news broadcasts, and peer pressure, for example. Such perceptions are thus unreliable indicators of what the legislative purpose of

the statute in fact was.[15] These problems were exacerbated by the district court's notion that the perceptions of those who *opposed* the statute were particularly valuable. The perceptions of those who oppose the statute were no truer or more reliable than the perceptions of the statute's supporters. Thus, in addition to being inherently unreliable, the evidence that the district court heard was likely skewed.[16]

4. The district court heard three experts testify about the effectiveness of the minute of silence as a teaching device. Dr. Scrupski, an associate professor at Rutgers Graduate School of Education, testified that the minute of silence served a useful pedagogical function by creating a boundary between school and non-school time. The boundary was important, Dr. Scrupski explained, because it would emphasize to the students the importance of the school hours, and the fact that school hours were a time for serious work rather than undisciplined play. Dr. Kurilloff, an associate professor of education at the University of Pennsylvania, and Dr. Rosner, a professor at the Temple College of Education, testified that they believed that the moment of silence before class would not be a valuable educational tool.

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15. I have found only one case, Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983) in which a court found public perception probative of legislative intent. *Duffy* is distinguishable because in that case there was significant direct evidence of legislative intent and the evidence of public perceptions was primarily cumulative; here, however, the other evidence of legislative intent is scant. If *Duffy* is not distinguishable, then I think that it was incorrectly decided, for the reasons stated in the text.

16. It is interesting to note that in her opinion in *Wallace*, Justice O'Connor described community perception of a minute of silence as evidence of impermissible *effect*, rather than of impermissible purpose. 105 S. Ct. at 2500-01.

Once again, I find the evidence inadequate to support a finding of no secular purpose. Not only was the testimony that there is no pedagogical merit to a minute of silence contested, but even if it had stood alone and uncontradicted it would not establish lack of secular purpose. The testimony of the plaintiffs' experts may cast doubt upon the *effectiveness* of the statute as a transitional, or boundary, device. But proof that the statute was an unwise or ineffective measure is not proof that it lacked a secular purpose. It is significant only if the statute seems so patently ineffective or irrelevant with respect to the alleged secular purpose that it is unreasonable to believe that the legislature enacted the statute to serve that purpose. The expert testimony in this case could not give rise to such an inference; indeed, as noted, there was disagreement among the experts as to the pedagogical merit of the statute. Under the circumstances, the expert testimony was of little value in establishing the lack of a secular purpose.

5. The district court described the attempts by prior New Jersey legislatures to pass a minute of silence or moment of prayer statute. This evidence has a more prominent role in the majority's opinion than it did in the district court's. It is clear, however, that both the district court and the majority consider the perceived purposes of the previous bills to be indicative of the purpose underlying the statute.

I believe that the previous bills are irrelevant. The bills were submitted to different legislatures with significantly different memberships. The overlap between the sponsors and supporters of the statute and the sponsors and supporters of the previous bills is minimal. Thus the circumstances surrounding the prior bills supply little evidence of the legislative purpose behind the present enactment. Earlier drafts of the *same* bill can shed light on the intent behind the

final formulation, but the histories of completely separate bills have no such relevance.

6. The final evidence of legislative purpose may not be properly classifiable as evidence at all: the language of the statute itself. But the Supreme Court has stated that "a plausible secular purpose for [a] state's program may be discerned from the face of the statute." *Mueller v. Allen*, ___ U.S. ___, ___, 103 S. Ct. 3062, 3066 (1983). Here the neutral language of the statute is evidence in favor of a secular legislative purpose, *i.e.*, the providing of a moment of calm before the beginning of classes.

In sum, reviewed under a plenary standard none of the evidence on which the plaintiffs rely is sufficient, separately or cumulatively, to prove an absence of any secular purpose behind the statute. The evidence is equivocal at best, and much of it may be irrelevant. The single unambiguous piece of evidence -- the face of the statute itself -- attests to the secular motives of the legislators. Parts of the testimony of the witnesses who attended the hearings also support this conclusion. I therefore believe that the statute has a secular purpose, that it is therefore constitutional, and that the majority is in error.

In the next section, I shall explain that I would reach the same conclusion even if we were obliged to defer to the findings of the district court.

C. *Result Under a Deferential Standard of Review*

My conclusion that a statute is constitutional does not depend on either the standard of review I have employed or the admissibility of the newspaper clippings. Even if we were required to defer to the district court's findings, and even if the newspaper articles were admissible under Fed. R. Evid. 803(24), I would vote to reverse the judgment of the district court.

All that is required by *Lemon* is *a* secular purpose. *Wallace, supra*, 105 S. Ct. at 2494 (Powell, J., concurring) ("We have not interpreted the [purpose] prong of *Lemon, supra*, however, as requiring that a statute have 'exclusively secular' objectives."); *Lynch, supra*, 104 S. Ct. at 1363 n.6 ("We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon* requires."). Indeed, the Supreme Court has refused to hold unconstitutional, on the ground that there was some secular reason for them, practices that would seem to be purely religious. In *Lynch*, for example, the municipality's celebration of Christmas and its depiction of the origins of that holiday were considered legitimate and sufficient secular purposes.

The evidence simply does not demonstrate that the statute lacks any secular purpose. Although the newspaper articles and the testimony of persons who attended the legislative hearings reveal that some legislators had prayer in mind, these very sources of evidence also contain descriptions of a secular purpose, the purpose of providing a moment of calm before the beginning of classes. As the Supreme Court has stated, "a statute that is motivated in part by a religious purpose may satisfy" the purpose prong of *Lemon*, as long as it has a secular aim, also. *Wallace, supra*, 105 S. Ct. at 2490.

Although under a deferential standard of review, I would accept the district court's decision to believe the plaintiff's expert witnesses and to disbelieve the conflicting expert testimony, I still find that this evidence about the *effectiveness* of the legislation has little bearing on its purpose. Nor do evidence of community perception of the legislative intent or the history of the seventeen prior minute of silence bills have much probative value in a purpose inquiry. Against this weak and possibly irrelevant evidence

stands the permissive and neutral wording of the statute, with its strong indicia of constitutionality, *see* Part I, *supra*, bolstered by statements in newspaper articles and observer's testimony that at least some legislators endorsed the statute for a secular reason. I therefore conclude that the district court clearly erred in finding that the statute had no secular purpose.

III. *CONCLUSION*

In sum, I agree with the majority that the statute is permissive and that it neither produces impermissible effects nor fosters excessive governmental entanglement with religion. Although the characterization of the statute as an accommodation of religion is not determinative of its constitutionality, I nonetheless have serious reservations about the majority's accommodation analysis and believe that its flaws emphasize how unlikely it is that the statute is unconstitutional. In my view, a permissive and facially neutral statute such as the New Jersey moment of silence is presumptively constitutional; that the presumption is all the stronger when, as here, the enactment passes the entanglement and effects test of *Lemon*; and that such a presumption cannot be overcome in the absence of clear evidence of a secular purpose.

I find that the evidence concerning lack of a secular purpose in the case does not overcome this presumption of constitutionality. I reach the same conclusion both under the plenary standard of review that I believe must employ and under the deferential standard that the majority employs. I therefore would reverse the judgment of the district court. Accordingly, I respectfully dissent.

Appendix A

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Opinion of the United States District Court for the District of New Jersey

(Filed—October 24, 1983)

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No. 83-89

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK TULLOSS, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually,

Plaintiffs,

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Defendants.

Appendix B

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and

ALAN J. KARCHER as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO as President of the New Jersey Senate and the NEW JERSEY SENATE,

Defendants-Intervenors.

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Appendix B

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Debevoise, District Judge.

This is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§2201 and 2202. Plaintiffs seek to have declared unconstitutional a State statute, namely, New Jersey P.L. 1982, Ch. 205 which provides that:

Appendix B

1. Principles and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

2. This act shall take effect immediately.

Plaintiffs are public school children and parents of such children who either are not religious and view the minute of silence as an enforced religious observance or else are religious and oppose required participation in this particular observance. One plaintiff, Jeffrey May, is a teacher in the Edison Township school who declined to conduct a minute of silence in his classroom on the ground that it is a religious observance and who was threatened with discipline for this failure.

Defendants are Saul Cooperman, Commissioner of New Jersey's Department of Education which is responsible for implementing the minute of silence bill, the Edison Township Board of Education and the Old Bridge Township Board of Education.

The statute became effective on December 16, 1982 when the New Jersey State Senate overrode the Governor's Veto, the Assembly having overridden the veto on December 13. By reason of the aproaching Christmas recess the full effect of the statute was not felt until January 1983, when the public schools reopened.

This action was filed on January 10, at which time I issued an order temporarily restraining implementation

of the statute. Subsequently the parties and the New Jersey Assembly and New Jersey Senate, which intervened as defendants, agreed to an extension of the temporary restraint until the trial of the case, thus in effect converting the temporary restraining order into a preliminary injunction.

The original defendants did not take an active role in the defense of the case. This inactivity flowed, no doubt, from the fact that the State's Governor and Attorney General had concluded that the statute violated the United States Constitution and that they could not in good faith defend it. However, the intervening defendants vigorously contested the action both during pretrial discovery proceedings and at the trial itself.

The trial commenced on September 13, 1983. Both sides produced extraordinary useful witnesses. Each witness was articulate and effectively testified as to a significant aspect of the case. The witnesses viewed the statute, its purpose and effect from very different perspectives. Each witness held strong views concerning the educational and/or religious implications of the statute. All of their views were essential for an understanding of the issues and contributed significantly to the resolution of these issues.

The Facts

In the early 1960's the United States Supreme Court held that school-sponsored prayer and Bible reading in the public schools are unconstitutional. *School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963); *Engel* v. *Vitale,* 370 U.S. 421 (1962). These decisions

required modification of the exercises which traditionally had been conducted in New Jersey's public schools at the start of each day. These exercises typically include reading from the Old Testament and recital of the Lord's Prayer.

There was very substantial opposition to the Supreme Court's decisions, and in many parts of the United States various measures were proposed to change the ruling or evade it. In New Jersey legislation was proposed from time to time with the rather obvious purpose of reintroducing opening prayer in some form in the public schools.

At first such proposed legislation specifically mentioned prayer. For example, A. 146 (1969), which authorized "a brief period of silent prayer or meditation", was vetoed by Governor Hughes who had doubts as to its constitutionality. In 1971 a similar bill (A. 597 (1970)) was vetoed by Governor Cahill on similar grounds.

In 1978 the legislature adopted A. 648 which mandated "a brief period of silent meditation" at the beginning of each day and explicitly disavowed any intent to create a religious exercise. Governor Byrne declined to approve the bill and it failed to become law. He based his decision in part on the bill's possible violation of the Establishment Clause or the Free Exercise Clause of the First Amendment and in part on the lack of any useful purpose of the bill.

In 1980 Assemblyman Zangari introduced A. 2197 which called for a one minute period of silence in each public school during each school day. On May 4, 1981 Governor

Byrne returned this bill unsigned on the grounds that it was either unconstitutional or unnecessary.[1]

The statute which is the subject of this case was introduced as Assembly Bill No. 1064 on March 8, 1982. Its principal sponsor was Assemblyman Zangari, who was joined by 54 other members of the Assembly. Assemblyman Zangari had previously introduced three other bills on related subjects: one calling for an amendment to the United States Constitution to permit prayer in public places, including public schools (A. 162 (1980)), another providing for a period of prayer or scripture reading in each school before the beginning of the school day (A. 2196 (1980)), and still another providing for a one minute period of silence after the beginning of each school day (A. 2197 (1980), referred to above).

The New Jersey legislature does not preserve an official record of its hearings and debates, and consequently this source of information concerning the purpose of legislation is not available.[2] However, several witnesses des-

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[1] It would seem that the minute of silence law under review in this case is the eighteenth in a series of school prayer or moment of silence bills introduced in the New Jersey legislature since 1970. Drakeman, Prayer in the Schools: Is New Jersey's Moment of Silence Law Constitutional? 35 Rut. L. Rev. 341 (1983) (*see* footnote 92 at 356 for a listing of the bills).

[2] During the pretrial phase of this case plaintiffs sought to fill the gap left by the absence of a legislative record by taking the depositions of individual legislators and otherwise subjecting them to discovery. I concluded that although the legislative privilege contained in the federal constitution is not available to the state legislator and although the legislative privilege contained in the State

(Footnote continued on following page)

cribed some of the legislative committee meetings which they attended by reason of their interest in the Bill.

Joseph Chuman, leader of the Society for Ethical Culture for Bergen County testified in opposition to the Bill before Senator Feldman's Education Comittee on June 21, 1982. The hearing on the Bill lasted 1½ to 2 hours. Three committee members, including Senator Feldman, were present. Two representatives of education organizations and a representative of the American Civil Liberties Union spoke against the Bill. Assemblyman Zangari spoke in favor. He argued that it would serve a useful psychological purpose. He pointed out that although he was a Catholic he went to Protestant schools and was encouraged to participate, which never did him any harm. When Chuman spoke to him afterwards Assemblyman Zangari asserted that he would be happy to see verbal prayer and Bible reading in the schools. Asked about the effect on atheists, he stated that they were so few in number their views could be discounted. Mr. Chuman could recall no discussion before the Committee of the education purposes of the Bill.

(Footnote continued from preceding page)

constitution is not available in § 1983 actions asserting deprivation of federal rights, for general policy reasons the law does not permit individual state legislators to be subjected to discovery in civil cases involving the interpretation or validity of state legislation absent very compelling reasons. Such reasons did not exist here. However, I also concluded that the absence of any official record of legislative proceedings and the inability to depose individual legislators created a situation in which it was more likely that otherwise inadmissible sources of information might be admitted into evidence as indicative of legislative intent, *e.g.*, newspaper accounts of proceedings admitted as an exception to the hearsay rule under Evid. R. 803 (24).

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Marianne Rhodes, Associated Director of Government Relations of the New Jersey School Board Association, attended a May 17, 1982 hearing of an Assembly Committee and a September 23, 1982 hearing of the Senate Education Committee. She made memoranda of the discussions concerning Bill A. 1064. At the Assembly Committee hearing Assemblyman Zangari stated that the Bill had been reduced to 54 words and that it was important that society get back to deeply embedded religious values. He quoted President Reagan as advocating adoption of a constitutional amendment allowing school prayer.

Ms. Rhodes recorded that at the September 23 Senate hearing Senator Ewing and Assemblyman Zangari spoke for the Bill. In response to Senator Feldman's question why the Bill was necessary since students could pray whenever they wished, Assemblyman Zangari stated that "They [students] publicly won't do it [pray] unless they are directed."

The Rev. Dudley E. Sarfaty is Associate General Secretary of the New Jersey Council of Churches, a group composed of representatives of 15 Protestant denominations. He attended the sessions of the Assembly at which the question of overriding the Governor's veto was debated. He made notes of these sessions. Assemblyman Michael F. Adubato urged that it would be a good thing if the State subsidized parochial education, and the Bill was a step in the right direction. Senator Dumont stated that the kind of ceremony required by the minute of silence Bill would cut down crime and disruption and that the legislature should not be rigid on matters of church and state. Senator Cardinale asserted that "We know what the people want" and asked rhetorically whether the mem-

bers of the State Senate were the servants of the people or the courts. The only argument which Rev. Sarfaty heard touching on possible educational benefits of the Bill was Senator Dumont's assertion that the minute of silence would cut down crime and disruption.

It is significant what those who opposed the Bill conceived its purposes and effect to be, because in many instances they were among those most directly affected by it.

The Ethical Culture Society of Bergen County styles itself as a liberal religious organization, the purpose of which is to further respect for the individual. It viewed the Bill as an attempt to return prayer to the public schools in another guise and opposed the Bill in the legislature.

The New Jersey School Board Association is a body created by statute comprised of representatives of 611 school districts in the State. Its purpose is to promote public education in New Jersey and to assist local school boards. In the past, at the direction of a very substantial majority of the delegates from the constituent school boards, it opposed legislative efforts to mandate prayer or silent meditation in the public schools on the ground that the practice had no educational value. A small minority of the Association's delegates opposed the Association's position on the ground that prayer should be returned to the schools. By virtue of the strong stand which the delegates had taken on previous prayer and meditation bills, the Association's directors urged the legislature to defeat Bill No. 1064. The rationale offered for its adoption, the calming effect which a moment of silence would have upon students, was viewed as a pretext for a religious purpose.

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The American Baptist Churches of New Jersey, the corrdinating body of 235 American Baptist Churches in the State, has consistently opposed the prayer and meditation bills introduced into the New Jersey legislature. It has done this on religious grounds. The mandated silence was viewed as an attempt by the State to impose something having the appearance and nature of a religious observance. At the very heart of the American Baptist faith is the tradition of religious liberty and opposition to any move by the state to intrude into religious affairs. Legislation mandating prayer, meditation and silence is conceived to be state intrusion into religious matters, the effect of which will be to cheapen and "trivialize" true religion. Significantly some American Baptist pastors and members did not agree with the position taken by their denomination's coordinating body. They did not agree because they viewed the minute of silence Bill as a useful way to bring religion into the schools.

The New Jersey Education Association is a labor organization having 117,000 members working in New Jersey's public schools. Of this number 84,000 are teachers. The organization opposed Assembly Bill 1064, perceiving it to be a back door approach to bringing prayer into the public schools.

Despite the opposition, both the Senate and the Assembly voted to override the Governor's veto of the minute of silence Bill and it became law on December 16, 1982. It was in effect only briefly before the temporary restraining order was issued in this case, but it is instructive to examine the impact which the Bill had in several school districts during the short period when it was being implemented.

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The intervenors produced evidence of experiences in the Sayreville school system through the testimony of an elementary school teacher, Evelyn A. Swenson, the testimony of an elementary school principal, John D. Singer, and the tape of a CBS television news broadcaster showing interviews of students, a school board member and teachers after implementation of Assembly Bill 1064.

Sayreville is a community having a large number of middle income, blue collar inhabitants and a large number of first and second generation citizens of Central European and Scandinavian ancestry. It also has Black, Asian and Hispanic inhabitants.

For many years the Sayreville public schools had commenced each day with a psalm, the Lord's Payer, the salute to the flag and a patriotic song. In 1969, following the Supreme Court's school prayer decision, the Sayreville Board of Education adopted a resolution which was designed to give people an opportunity to pray. The resolution, which was moved by Board member DiPoalo provided:

> Approval was granted for a 2 minute meditation period to be instituted in our school system after the salute to the flag in the morning for any child who wants to pray, with the provision that no student be forced to pray if he is unwilling, nor deny any student the right to pray.

From that time on all the Sayreville public schools have commenced the day with opening exercises which culminated in a moment of silence. Soon after adoption of the 1969 resolution it became apparent that two minutes of silence was not feasible and by tacit agreement the period of silence was reduced in practice to 30-45 seconds.

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Mrs. Swenson testified that at the outset she explained to students the meaning of mediation as silent, private, serious contemplation or thinking. She instructed her students to close their eyes in order that they would not distract each other. It was an opportunity to pray, but no one was required to do so. Some children sat with their hands clasped. Once or twice she noticed a child crossing himself. No parents or children ever expressed concern about the practice, and Mrs. Swenson viewed the ceremony as a helpful way to start the school day. On other occasions during the day she uses periods of silence for specific purposes. For example in science class she may ask the students to maintain silence and determine how many different sounds they can hear. Or in reading class she may ask the students to imagine a particular person or event.

In 1978 the 1969 resolution was modified by the adoption of Policy 808 specifying procedures for opening exercises. It provided for the salute to the flag as a part of each day's opening exercises and stated that, "Opening exercises may also include the singing of patriotic songs and a moment of silent meditation."

Although the language of Policy 808 differed from the 1969 resolution in that there was no reference to prayer and in that the mandated two minutes of silence was changed to a moment of silence, there was in fact no change in the Sayreville opening exercises after 1978. The effect of the 1978 enactment was simply to ratify the existing practice of reducing the length of the period of silence to 30 to 45 seconds.

The adoption of Assembly Bill 1064 required no change in Sayreville's opening exercises, except that perhaps,

literally construed, the Bill would require that the moment of silence come first in the sequence of opening events and that it last for 60 seconds.

The intervenors placed in evidence a tape of a two minute CBS interview of various persons in Sayreville concerning Sayreville's experience with its moment of silence. The interview was conducted on December 17, 1982, the day after the override of the Governor's veto. Children were shown practicing contemplation; a high school student described his experiences going back to fourth grade; a principal stated that the moment of silence created no disciplinary problems and had a salutary effect; School Board member DiPoalo, who had introduced Sayreville's 1969 meditation and prayer resolution, referred to nuclear and other crises facing today's world and opined that "people better do a little praying".

The reaction in Princeton was quite different from that in Sayreville. The school system has 2400-2500 students. Religiously the community is heterogenous. A majority of the residents are of Catholic or Protestant backgrounds. Fifteen to twenty percent of the population is Jewish. Students from forty countries are in the school system and most of the major religions of the world find adherents among the student body.

The minute of silence Bill was the subject of considerable discussion among at least the high school students. It was generally considered a form of prayer which some students opposed and some approved. One high school student, Denice Fishburne, collected 200 signatures on a petition in opposition to the Bill. Another student collected 100 signatures.

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Princeton's Superintendent of Schools, Dr. Paul D. Houston, testified at the trial. He stated that immediately after the override of the Governor's veto he began receiving telephone calls from parents who did not wish their children to be in class when the minute of silence was observed, as they viewed the exercise as a form of enforced prayer. Principals telephoned him expressing fear that enforcing the statute would cause student disruption and stating that many students and some teachers would not observe the new law. Dr. Houston refrained from implementing the statute until he met with the school board. The board was uniformly opposed to the law, believing it to be unconstitutional as a compulsory religious observance in the public schools. By consensus it was agreed that the statute would not be implemented in the Princeton public schools pending a court determination of its validity. In Dr. Houston's opinion there is no educational justification for requiring that all students be silent at the same time. Moreover, were it to be implemented, arrangements would have to be made to excuse large numbers of students who did not wish to participate. He observed that teachers can and do provide for silent contemplation when it fits in with an educational purpose.

Mark Tulloss, an eighth grade student in Roosevelt, New Jersey, had discussed the Bill in his history class. He and most of his classmates opposed a minute of silence on the ground that it constituted prayer, but after the veto override the principal of his school gave instructions that at the start of each day every student was to observe the minute of silence by standing up, bowing his head and closing his eyes. Tulloss remained silent during these periods, but refused to bow his head or close his eyes. He

continued reading. The reaction of his classmates to the exercise was that it was "boring", "stupid".

Paramus is a community of 30,000 people, the Jewish, Protestant and Catholic faiths each being equally represented among the population. Dr. Paul Shelly, Superintendent of the Paramus school system, testified that students and teachers generally perceived the minute of silence Bill as an effort to circumvent the Supreme Court decisions and to reintroduce prayer into the schools. The State Board of Education sent no guidelines to the various school districts after the Bill became effective; it simply distributed a copy of the Bill. There were objections to implementing the Bill in Paramus, and Dr. Shelly simply informed teachers that the law had been passed, without elaborating upon how it should be implemented.

Plaintiff Cary Butler, a 17 year old student in the Hillsborough Township High School did not wish to participate in the moment of silence when the entire school was directed by the prinicpal to sit for the minute of silence and be perfectly quiet and still. It was a matter Cary had discussed at home and he and his family concluded that the enforced minute of silence violated their beliefs. He asked his teacher to leave, and the teacher sent him to the school office for a determination. In the hall another teacher directed him to stand still and be quiet, which he refused to do on the ground that it would be enforced prayer. Cary was charged with insubordination and suspended, but shortly he was permitted to return to classes and leave his homeroom during the minute of silence. This dispensation was not granted to other students, the principal preferring to handle requests on a case-by-case basis.

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Plaintiff Gary Drew and his wife are Roman Catholics who have six year old and nine year old daughters in the Old Bridge Township public schools. They object to use of the minute of silence in the schools because they believe religious training and observance should be taught in the home and the church. They do not wish to have their young and impressionable children subjected to whatever practice teachers may employ in implementing what they view as an essentially religious observance. They did not instruct their children to leave their classrooms when the minute of silence was observed, because they were concerned that it would unduly embarrass them.

The pain that such a move would cause a young child is illustrated by the circumstances in which Rita Rothenberg and her family found themselves. Mr. and Mrs. Rothenberg asked their young son Joshua to decline to participate in the minute of silence on religious grounds. The thought of being separated from the other children so upset Joshua that his parents did not persist in their request that he leave the room during the minute of silence.

Plaintiff Jeffrey May is a high school teacher in the Edison school system. He is an agnostic and views the minute of silence as a form of prayer in which he cannot in good conscience participate.

On December 22, 1982 he and all other faculty members received a memorandum from the principal of his high school. The memorandum directed all faculty members and students to participate in a minute of silence as directed by the State Legislature. Mr. May informed his principal that he could not and would not participate because he views the law to be unconstitutional and because it violated his conscience and personal philosophical beliefs.

He was nevertheless directed to take part. He refused to do so and was threatened with disciplinary action.

The foregoing represents types of reactions in the public schools in New Jersey after Bill 1064 became effective.

Dr. Calvin Thompson, a psychologist, testified for the intervenors. He had conducted a study in the Las Cruces, New Mexico Public School District of the public perception of the moment of silence law in effect in that District. The District has 14,000 school children. Its population is largely middle class with approximately 50% of the population being of Hispanic origin and approximately 50% being "Anglo". There is a small number of Black and Indian inhabitants. The population is predominantly Christian—Catholic and Protestant—with a lesser number of Jewish inhabitants.

Las Cruces' moment of silence law is described in *Duffy* v. *Las Cruces Pub. Schools,* 557 F. Sup. 1013 (D. N.M. 1983). Dr. Thompson studied the effect of the practice by televising a number of classrooms before, during and after the moment of silence, by watching the period of silence and by conducting structured interviews with students. On the basis of his study Dr. Thompson concluded that most persons viewed the moment of silence as simply silence and not as prayer. He concluded that it served as a transitional tool separating outside activities from school work and that it was a moment which could be used for meditation or prayer. Some of the students who were interviewed stated that they used the moment for prayer. In any given observation he made, from 0 to 20% of the students assumed positions which could be inter-

preted as having the probability of being a religious act.[3] Dr. Thompson was of the opinion that the public perception of the moment of silence in New Jersey would be similar to the perception in New Mexico. Dr. Thompson provided interesting data, but I think care must be exercised in generalizing on the basis of it. There are major differences between New Jersey and New Mexico. More important, there are major differences between the many communities in New Jersey. As the other evidence in the case clearly demonstrates, attitudes toward the minute of silence differ greatly from one New Jersey community to another. Las Cruces may reflect attitudes in some of them but certainly not in all or perhaps even in very many of them.

Having described the genesis of Bill 1064 and the reaction to its becoming effective, it is necessary to examine briefly its religious and educational implications.

Plaintiffs offered the testimony of Dr. Langdon Gilkey, professor of theology at the University of Chicago Divinity School and a Baptist minister. Dr. Gilkey teaches historical theology and the relationship of theological views to contemporary culture. He offered a definition of religion which is serviceable for the purpose of this case and can be used to analyze the facts established here. It is a definition which, I believe, is in accord with the develop-

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[3] When the moment of silence was implemented in Las Cruces the school children were given notes to take home to their parents so that the family could discuss what the students would do during the ent moment. Dr. Thompson's four children exhibited a diversity of reactions. His teen-age son believed the statute violated his constitutional rights. One daughter wished to use the moment for prayer. Another daugher asked if she could chant. A third daughter did not do much with the moment.

ing concept of religion reflected in more recent Supreme Court decisions, *see* Judge Adams' discussion of the definition of religion for constitutional purposes in his concurring opinion in *Malnak* v. *Yogi,* 592 F.2d 197, 200-215 (3d Cir. 1979).

All religions, according to Dr. Gilkey, have three components: (i) each embodies a view of ultimate reality—especially as it concerns the human predicament and the resolution of the difficulties human beings confront as they proceed through life; (ii) each religion prescribes a way of life, which constitutes a response to the ultimate reality perceived by that religion; and (iii) each religion with its view of ultimate reality and its way of life is embodied in an historical community of faith which links the past, the present and the future.

The second element of religion—the way of life which responds to the perception of ultimate reality—includes such practices as participation in the sacraments and prayer. This is the point at which Assembly Bill 1064 is charged with impinging upon or furthering religion.

In the Christian, Jewish and Islamic religions God is viewed as the ultimate reality and prayer is usually central to the way of life which responds to that ultimate reality. In other religions, such as Buddhism, God may not be the ultimate reality and the response may be meditation or other observances rather than prayer.

Even where a principal component of a religion's way of life is prayer, the forms of prayer may differ widely, being conditioned by historical and cultural traditions, by time and by place. In the traditional American culture silence, bowing one's head and clasping one's hands is

associated with prayer. This reflects the development of Protestantism, Reform Judaism and Catholicism. Historically, however, Catholics kneeled and Jews raised their hands. Members of the Islamic faith may kneel on prayer rugs, face east and call out loud upon Allah. For Quakers silence itself is prayer. For others prayer must be vocal. With the increasing cultural and religious diversity in the United States, with traditional western religions being supplemented by adherents of and converts to eastern religions, diversity in the forms of prayer has proliferated.

What the minute of silence Bill has done is to mandate that all students assume the posture of one traditional form of prayer. While this may provide the opportunity for many perons to engage in their kind of prayer, the enforcement of silence either in a seated or standing position prevents others from engaging in their kinds of prayer.

Like the Rev. George D. Younger, who testified as to the views of the American Baptist Churches of New Jersey, Dr. Gilkey was of the opinion that legislative acts such as Bill 1064 which may lead to objective prayer will have the effect of causing a rejection of genuine religion in all of its three components. That is to say, the intervention of the state is counterproductive—enforcement of religious observances will induce cynicism and resistance on the part of any healthy person and the rejection of that which the state is seeking to instill.

Intervenors maintain that Bill 1064 has a secular purpose, namely, providing a period of transition from the many concerns of the students outside of school to the work of the school. In support of this thesis the intervenors offered the testimony of Dr. Adam Scrupski, an

associate professor at Rutgers Graduate School of Education. He was of the opinion that the minute of silence can serve a useful pedagogical function as a supplement to or as an opening exercise forming the boundary between school and not-school. Silence connotes seriousness and solemnity, as in a courtroom, library or place of worship, and having a teacher administer the period of silence serves to accentuate his or her role in the educational process. There is a need for a boundary, according to Dr. Scrupski, and a ritual such as a moment of silence serves to provide the boundary. He viewed the salute to the flag as a less effective boundary than it once was, although it can still serve that purpose.

The experience in Sayreville's schools certainly suggests that in combination with the flag salute and a song a brief period of silence serves a transition purpose.

The circumstances of Dr. Scrupski's retention as the intervenor's expert casts some doubt on the proposition that the State legislators enacted Bill 1064 in a search for the best method of effecting a transition from non-school to school activities. In the spring of 1983, long after the temporary restraining order was entered, Dr. Scrupski happened to discuss the Bill with a friend who worked on the staff of one of the Legislature's Committees on Education. The staff member asked him if there might be a secular purpose for the law. In the words of Dr. Scrupski, "He was interested in knowing if I thought there was a secular consequence, a good reason, so to speak" (Tr. at 546). Dr. Scrupski found a secular consequence and was retained to testify concerning it.

I will not summarize the testimony of plaintiffs' experts, Dr. Peter J. Kuriloff, associate professor of education

at the University of Pennsylvania and Dr. Stanley L. Rosner, a professor at the College of Education at Temple University. Their testimony and that of the other witnesses of both parties convinces me beyond any doubt whatsoever that one minute of silence as a transitional device for all grade levels in all schools for all kinds and conditions of students has little educational justification. Frequently the bustle of the playground cannot be transformed into serious school work by a requirement to sit still; rather some alternative action must be engaged in to transfer the students' attention to the work of the school. For young children a minute of silence may be an eternity, while many older students could handle it with ease. For hyperactive or handicapped children a minute of silence may be an impossibility. There is no evidence that any school in New Jersey was having any difficulty effecting a transition from non-school to school. Even in Sayreville which incorporated a period of silence at the end of its active opening exercises, the authorities found that they could not handle more than 30 to 40 seconds of mandated silence and simply disregarded the Board of Education resolution which mandated a longer period.

It is unclear whether Bill 1064 requires that every student remain present during the minute of silence or whether it simply requires that every student be given an opportunity to observe a minute of silence with the right of those who do not wish to participate to absent themselves. If the former interpretation is adopted, it is quite clear from the Princeton experience that significant numbers of students and teachers will refuse to observe silence on religious or other grounds based on conscience. If the latter interpretation is adopted, varying numbers of students and teachers will elect to stay away from the

observance. In either situation the exercise will have only marginal utility as a transitional device for all students.

Having set forth the evidence in some detail, it is possible to draw from it certain generalized factual findings:[4]

1. From a religous perspective New Jersey's population is diverse. It includes persons holding deep religious convictions; it includes persons who are indifferent to religion; it includes persons who, as a matter of conviction, belong to no organized religious body and engage in no religious observances.

2. The very substantial portion of New Jersey's population which considers itself religious exhibits great diversity as to all three aspects of religion, that is to say, as to views of the nature of ultimate reality, as to the outward practices observed to express views of ultimate reality, and as to the particular religious bodies to which adherence is given.

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[4] Numerous newspaper articles and similar published materials were offered and received in evidence. During the pretrial stages of the case it seemed that perhaps such sources would be the best evidence of the purpose and effect of the legislation under consideration. However, the testimony and other evidence produced by both sides at the trial proved to be far more helpful in this regard. The articles are clearly evidence of the purpose of the legislation and to some extent are supportive of testimony concerning the public's perception of the Bill 1064. However the articles do not form a basis for my findings as to the public's perception. Consequently it is unnecessary to determine the extent to which public perceptions can be guaged from newspaper articles (*see* on this subject the testimony of Professor Jerome L. Aumente of the Rutgers Journalism Institute).

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3. Prayer, which is a common practice of many different religious bodies, takes many forms. Each form of prayer can be associated with particular views of ultimate reality and with particular religious bodies.

4. A short period of group silence at the commencement of the day or at the commencement of an undertaking constitutes one of the traditional forms of prayer of major religious bodies in New Jersey.[5]

5. The purpose of Bill 1064 was to mandate a period at the start of each school day when all students would have an opportunity to engage in prayer. This conclusion is drawn from the facts that:

a. Until the early 1960's when the United States Supreme Court held that school-sponsored prayer and Bible reading in public schools are unconstitutional, the New Jersey public schools traditionally included prayer and Bible reading as part of their opening exercises.

b. There was and is substantial public sentiment that prayer should be a part of opening exercises.

c. In response to this public sentiment and, in some cases, by reason of personal conviction, many New Jersey legislators introduced one bill after another in an attempt to reintroduce prayer in the public schools notwithstanding the Supreme Court's ruling.

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[5] The evidence produced at the trial of this case suggests that I spoke prematurely and over-simplified the situation when I concluded at the time plaintiffs applied for a temporary restraining order that "the statute on its face is neutral" and "does not purport by its terms to mandate prayer."

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d. Assembly Bill 1064 prescribing a minute of silence is but the most recent of such bills motivated by these sentiments.

e. The driving force behind the Bill came from those who deeply and sincerely believed that an opportunity for prayer in the public schools at the beginning of each day should be mandated.

f. Similarly one driving force in opposition to the Bill came from religious persons who perceived the minute of silence as a State prescribed religious observance violating their deeply and sincerely held belief that the State cannot involve itself in religious matters.

g. Other opposition to the Bill came from non-religious persons who perceived the minute of silence as an enforced religious observance.

6. The purpose of the Bill, urged at the trial, to provide a transition from non-school life to school work is an after-the-fact rationalization and not the real purpose of the Bill. This conclusion is drawn from the facts that:

a. There is no evidence that any school lacked an effective means of making the transition from non-school to school through such devices as the salute to the flag, a song, a period of announcements and taking attendance and the like.

b. The agencies having the most knowledge and experience with educational matters, namely the school boards and teacher organizations throughout the State, overwhelmingly opposed the Bill on the grounds that it had no educational value.

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c. While the minute of silence might serve as a transition device for some students of more mature years, it could not serve as such a device for younger students, certain handicapped students and others.

d. The attempt to develop rational support for the thesis that a minute of silence served a transitional purpose commenced after this law suit was underway rather than before the Bill was adopted.

7. As implemented the Bill requires all students to assume a posture identified as the posture of prayer of certain religious groups.

8. Although the Bill is designed to give persons an opportunity to pray, in fact it only gives an opportunity to pray to those whose prayers can be performed in the prescribed posture. Others whose prayers require action and/or sound are precluded from engaging in prayer during the minute of silence.

9. The experiences of various schools during the weeks when the minute of silence was enforced suggests that some students will use the minute of silence to pray; some will use it to engage in thoughtful meditation; some will tolerate it though considering it boring and stupid; some who believe it violates their religious convictions will nevertheless submit to it, not wishing to risk public ridicule; some who believe it violates their religious convictions will either refuse to observe it or will absent themselves from the place where others are observing it.

Appendix B

The Law

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Fourteenth Amendment makes the First Amendment binding on the states. *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

Bill 1064 requires that public school principals and teachers "shall permit students to observe 1 minute of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection." "Contemplation" has been defined in Webster's as "meditation on spiritual things" and "introspection" has been defined as "looking into or within, as one's own mind" or "inspecting, as one's own thoughts or feelings." Very simply, the issue posed in this case is whether, Bill 1064 constitutes a law respecting an establishment of religion or prohibiting the free exercise thereof. I conclude that Bill 1064 does constitute such a law.[6]

The test, stated negatively, is that "[A] legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with

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[6] Two recent law review articles have surveyed the law and analyzed the constitutional issues raised by moment or minute of silence laws in general. Note: Moments of Silence, 96 Harv. L. Rev. 1874 (1983); Note: Daily Moments of Silence in Public Schools, 58 N.Y.U. L. Rev. 364 (1983). Another recent law review article has analyzed New Jersey's minute of silence law. Drakeman, Prayer in the School, etc., 35 Rut. L. Rev. 341 (1983).

religion." *Committee for Public Education* v. *Regan,* 444 U.S. 646 (1980); *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973); *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Gilfillan* v. *City of Philadelphia,* 637 F.2d 924 (3d Cir. 1980); *Malnak* v. *Yogi, supra.* The statute under review does not pass muster under any of these criteria.

As found above, the purpose of Bill 1064 is religious not secular. Intervenors urge that "the unambiguous language of New Jersey's moment of silence law evidences a legislative interest to promote a secular purpose in a manner that is constitutionally neutral to religion."(Intervenors' Brief at 11, 12). Unless one examines the statute in a total vacuum, this conclusion is without rational basis. All the evidence points to the religious intent of this enactment—the period of more than a decade during which the New Jersey legislature sought to evade *Engle* and *Abington Township* in order to reintroduce a mandatory time for prayer in the public schools; the debate upon the Bill which was in terms of public prayer and State involvement in religion; the time and manner in which the minute of silence was mandated, following the form and posture of school prayer which was outlawed in the early 1960's.

This obvious attempt to cross the forbidden line becomes all the more apparent in light of the pretexual nature of the secular purpose advanced in this case. True, intervenors' witnesses testified that the Bill can serve as a useful boundary between non-school activities and school work. However, only the utterly naive would conclude that the Bill's advocates were fighting passionately for establishment for such a boundry. It is abundantly clear that once the Government's veto has been overriden and

litigation commenced, Bill 1064 became a statute in search of a secular purpose.

The intervenors urge, quite correctly, that "constitutional analysis of legislative purpose does not involve a judicial inquiry into supposed illicit legislative motive." (Intervenors' Brief at 26). There is a distinction, I believe, between the motives and purposes of individual legislators and an institutional legislative purpose. Legislators may have the purest of personal motives and produce unconstitutional legislation, and contrariwise individual legislators with wrongful motives may vote for a bill and produce legislation which is both beneficient and constitutional. This is illustrated by *United States* v. *O'Brien,* 391 U.S. 367 (1968), which upheld the provision of the Universal Military Training and Service Act of 1948 making it an offense to willfully and knowingly mutilate, destroy and change by burning a registration certificate. In light of the overwhelming obvious and important secular purpose of the Act, the Supreme Court upheld the constitutionality of this provision even though an incidental effect may have been to circumscribe a person's ability to express his views about the Act by burning his draft registration card. The Court noted that "this Court will not strike down *an otherwise constitutional statute* on the basis of an alleged illicit legislative motive". 391 U.S. at 383 (emphasis added). It declined, therefore, to give significance to the statements of one Senator and two House members as probative of the claim that the purpose of the provision at issue was to stifle free speech rather than to advance a secular purpose.

The present case is a far cry from *O'Brien.* Here there is no overwhelming secular purpose. Both the history of

this kind of legislation and the circumstances of the adoption of this particular Bill point inescapably to an essentially religious purpose. The statements of the legislators in committee, on the floor and to the public as disclosed by the evidence in this case are consistent with and confirmatory of an institutional purpose to accomplish something the Constitution forbids.

Intervenors point to the language of Justice Brennan's concurring opinion in *Abington School District* v. *Schempp, supra,* as support for the proposition that a moment of silence is a secular device:

> The second justification [of prayer and Bible reading] assumes that religious exercises at the start of the school day may directly serve solely secular ends—for example, by fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline.
>
> . . .
>
> I have previously suggested that Torcaso and the Sunday Law Cases forbid the use of religious means to achieve secular ends where nonreligious means will suffice. That principle is readily applied to these cases. It has not been shown that readings from speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, *or even the observance of a moment of reverent silence at the opening of class,* may not adequately serve the secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper

> degree of separation between the spheres of religion and government.

374 U.S. at 280, 281 (emphasis added).

The question of the purpose and effect of a minute or moment of silence was not at issue in *Abington*. That question is at issue in the present case, and I think a showing has been made that New Jersey's minute of silence does not jeopardize the religious liberties of members of the community and breaches the proper degree of separation between the spheres of religion and government.

The conclusion I have reached is consistent with the most recent federal district court cases passing on the constitutionality of moment of silence laws. *Duffy* v. *Las Cruces Public Schools, supra; Beck* v. *McElrath,* 584 F. Supp. 1161 (M.D. Tenn. 1982); *see also Opinion of the Justices to the House, etc.,* 387 Mass. 1201, 440 N.E.2d 1159 (Sup. Jud. Ct. 1982); *contra, Gaines* v. *Anderson,* 421 F. Supp. 337 (D. Mass. 1976). Intervenors argue that New Jersey's statute is inherently different from the statutes under review in those cases because there "the plain language of the statute, which incorporated the word prayer, made apparent their predominantly religious purpose." (Intervenors' Brief p. 14). Given the history and circumstances of the enactment of Bill 1064, I think it is clear that the omission of the word "prayer" is a cosmetic change only, having no substantial effect. Illustrative of the lack of any practical effect is Sayreville's experience. There the town's original enactment provided for a two minute meditation period in order that the students have an opportunity to pray. The subsequent change in language to omit the reference to praying was not intended

to result and did not result in any change in what was actually being done in the schools.

Nor do I believe that the recent Supreme Court case of *Marsh* v. *Chambers,* 51 U.S.L.W. 5162 (Jul. 5, 1983) was intended to modify the law governing State sponsored prayer in public schools. There the Court held that the practice of the Nebraska Legislature of opening each legislative day with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. The Court noted an unbroken history of more than 200 years during which legislators opened their sessions with a prayer but emphasized that in *Marsh* "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' ". Slip Op. at 8, 9. This latter comment, I believe, suggests a clear intent to distinguish legislative prayer by adults which, like the opening of court, is primarily of a traditional ceremonial nature from mandated prayer by school children.

Thus I conclude that Bill 1064 does not have a bona fide secular purpose and, in fact, has a religious purpose.

Turning to the second prong of the test of validity, I conclude that the Bill both advances and inhibits religion.

It advances the religion of some persons by mandating a period when all students and teachers must assume the traditional posture of prayer of some religious groups and during which those who pray in that manner can do so. This is exactly what happened during the time when Bill 1064 was in effect. In Sayreville, continuing past practice, students were instructed to sit, close their eyes and observe silence. In Hillsborough Township children

were directed to sit and be quiet and still. In Roosevelt Junior High School students were instructed to stand up, bow their heads, close their eyes and observe silence.

Thus the State has injected itself into religious matters by designating a time and place when children and teachers may pray if they do so in a particular manner and by mandating conduct by all other children and teachers so that the prayers may proceed uninterrupted in their presence.

While this form of legislation advances the religion of some, it inhibits the religion of others in at least two ways.

First, there are those whose religious practices include silent prayer and meditation but who, as an article of faith, believe that the State should have no part in religious matters. For them mandated prayer is no longer prayer. It is their conviction that if the State requires any form of religious observance the observance is drained of its substance, loses its power and becomes but an empty shell. *Cf.,* Tillich, *Dynamics of Faith,* Ch. III, Symbols of Faith (Harper & Row 1958). Thus the State, seeking to further religion by mandating certain religious observances, in fact weakens religion by draining vitality from these observances.

Examples of this emasculating process can be seen in the cases. When a legislature routinely opens its sessions with prayer, when a court commences each day with "God save the United States and this honorable court", the courts have recognized that the effect is not to establish religion. Rather, the words which are spoken may represent a solemn and traditional ceremony serving a valuable civil function. They are no longer the words of a believer

responding to his views of ultimate reality; they are, therefore, no longer prayer either in a religious or constitutional sense. Certain of those who oppose Bill 1064 on religious grounds seek to spare their mode of prayer from such a fate.

Second, by mandating a minute of silence which permits some persons to engage in prayer, Bill 1064 prevents other persons from engaging in their kind of prayer. Justice Brennan noted on his concurring opinion in *Abington*:

> . . . our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all. . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

The religious diversity of which Justice Brennan spoke in 1963 is far more pronounced now. Thus religious practices and the concepts of ultimate reality to which these practices point vary ever more widely. While once the prayers of most religious people could be carried on in an environment of silence, now that is no longer the case. The prayers of some persons require movement and sound. Bill 1064, therefore, mandates an environment which allows some to pray but which prevents others from engaging in their form of prayer.

Appendix B

Finally there are those who profess no religion and to whom any form of prayer is offensive. Bill 1064 requires these persons to assume a posture suggestive of particular forms of prayer which are responsive to particular beliefs about ultimate reality. Understandably those who do not share those beliefs do not wish to be required to maintain a pose which suggests that they do. Children holding these views, as illustrated in the present case, are forced either to endure an exercise which runs counter to their beliefs or to face public opprobrium or ridicule by asking to be excused each day.

There is nothing in the language or reasoning of the Supreme Court's opinion in *Mueller* v. *Allen*, 51 U.S.L.W. 5050 (June 29, 1983) which affects the conclusion that the effect of Bill 1064 renders it unconstitutional. There the Court upheld a Minnesota statute which permitted taxpayers in computing their state income tax to deduct certain expenses incurred for the education of their children. This result was reached even though most such expenses involved payments on account of students attending private schools and even though it was established that 95% of such students attended sectarian schools. Applying the three point test, the Court concluded the tax deduction satisfied the primary effect inquiry. However, *Mueller* is of very limited utility in the present case. It is but the most recent in a long line of cases dealing with the question of the extent to which state legislation may, directly or indirectly, aid sectarian schools. The facts of those cases and the problems of church and state relations which they raise are quite different from the facts and problems raised by the school prayer cases.

Bill 1064 impermissibly advances the religion of some and inhibits the religion of others.

Appendix B

The third inquiry is whether Bill 1064 fosters an excessive government entanglement with religion. Implementation of the Bill would not involve the State in the kind of continued and pervasive monitoring of sectarian activities which was condemned in *Lemon* v. *Kurtzman, supra.* It would, however, tend to promote divisiveness among and between religious groups, another form of entanglement. *Gilfillan* v. *City of Philadelphia, supra,* at 932. A required minute of silence would put children and parents who believed in prayer in the public schools against children and parents who do not. The events in Princeton are illustrative of this consequence. There the school administrators were threatened with disruptive behavior by students who believed the minute of silence constituted enforced prayer contrary to their own convictions. Elsewhere the opposition did not take the form of threatened disruption, but children and parents were forced to decide whether the children should submit to an exercise which violated their beliefs or whether they should separate themselves from their peers.

With no secular purpose being served, this degree of entanglement causes Bill 1064 to fail the third prong of the test of validity.

For the foregoing reasons Bill 1064 violates the First Amendment and plaintiffs are entitled to a judgment granting the declaratory and injunctive relief they seek.[7]

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[7] Helpful amicus briefs were filed on behalf of the following organizations: New Jersey Education Association (by Zazzali, Zazzali & Kroll, James R. Zazzali, Esq. and Kenneth I. Nowak, Esq., on the brief); New Jersey Council of Churches (by Donald

(Footnote continued on following page)

Appendix B

Under 42 U.S.C. § 1988 a prevailing party may in appropriate circumstances be entitled to recover attorneys fees. In the unusual circumstances of this case I do not believe that such an award is warranted.

The named defendants did not contest the action on the merits. They were not responsible for enactment of the legislation under review. There is no reason why they should be required to pay plaintiffs' attorneys fees.

The intervenors did oppose plaintiffs on the merits. However, even though they did not prevail, their participation in the case served a valuable public purpose. Without their participation the facts and the law would not have been developed adequately. In a difficult case such as this in which important public interests are involved, it was essential that the facts be developed and the law fully presented. Since intervenors' role in this case contributed significantly

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(Footnote continued from preceding page)

L. Drakeman, Esq.) Anti-Defamation League of B'nai B'rith, American Jewish Committee, Essex County Board of Rabbis, Jewish Federation of Central New Jersey, Jewish Federation of Southern New Jersey, New Jersey Assocation of Reform Rabbis, New Jersey-West Hudson Valley Council of the Union of American Hebrew Congregations, and United Synagogues of New Jersey (Howard T. Rosen, Esq.; Of Counsel: Justin J. Finger, Jeffrey P. Sinensky, Ruti G. Teitel, Samuel Rabinove, Andrea S. Klausner, James H. Laskey and Alan Goldstein); American Jewish Congress, Jewish Community Federation of Metropolian New Jersey, Jewish Federation of North Jersey, Jewish Federation of Raritan Valley, Bayonne Jewish Community Council, and National Council of Jewish Women (by Stern, Steiger, Croland & Bornstein, P.A.; Of Counsel: Nathan Z. Dershowitz, Esq. and Marc D. Stern, Esq.; On the brief: Kennth S. Goldrich, Esq., Marc D. Stern, Esq. and Jay Rubenstein, Esq.).

in that regard it would be inappropriate to charge them with attorneys fees.

For the same reason no costs will be allowed to any party.

Plaintiffs' attorneys are requested to prepare a form of order implementing this opinion.

DICKINSON R. DEBEVOISE
U.S.D.J.

Dated: October 24, 1983

APPENDIX C

Order of the United States District Court for the District of New Jersey

(Filed—November 10, 1983)

UNITED STATES DISTRICT COURT

District of New Jersey

Civil Action No. 83-89

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK TULLOSS, an infant, and BONNIE SCHORSKE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually,

Plaintiffs,

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Defendants.

and

Appendix C

ALAN J. KARCHER as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO as President of the New Jersey Senate and the NEW JERSEY SENATE,

Defendants-Intervenors.

THIS MATTER having been tried before the Court, non-jury, upon plaintiffs' application for Declaratory and Injunctive Relief brought pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Sections 2201 and 2202, seeking to have declared unconstitutional New Jersey Public Law 1982, Ch. 205, and the issues having been duly tried, and the Court having made its findings of fact and conclusions of law as set forth in its Opinion dated October 24, 1983;

IT IS on this 10th day of November, 1983 ORDERED, ADJUDGED and DECREED that New Jersey P.L. 1982, Ch. 205 is unconstitutional on its face and as applied, and that judgment is granted in favor of the plaintiffs herein.

It is FURTHER ORDERED that plaintiffs are not entitled to recover attorney's fees or costs pursuant to 42 U.S.C. Section 1988, for the reasons set forth in the Court's Opinion dated October 24, 1983.

DICKINSON R. DEBEVOISE
U.S.D.J.

APPENDIX D

Judgment of the United States Court of Appeals for the Third Circuit (Nos. 83-5890 and 84-5126)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 83-5890 and 84-5126

JEFFREY MAY, individually; JEAN ROSS, as natural parent of DAMON ROSS, an infant, and JEAN ROSS, individually; BONNIE SCHORSKE, as natural parent of MARK SCHORSKE, an infant, and BONNIE SHORKSE, individually; BRENDA BUTLER, as natural parent of CARY BUTLER, an infant, and BRENDA BUTLER, individually; GARY DREW, individually,

v.

DR. SAUL COOPERMAN, Commissioner of the Department of Education; NEW JERSEY DEPARTMENT OF EDUCATION; EDISON TOWNSHIP BOARD OF EDUCATION; OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Defendants,

ALAN J. KARCHER as Speaker of the New Jersey General Assembly; the NEW JERSEY GENERAL ASSEMBLY; CARMEN A. ORECHIO as President of the New Jersey Senate; the NEW JERSEY SENATE,

Defendant Intervenors,

Appendix D

NEW JEREY COUNCIL OF CHURCES,
NEW JERSEY EDUCATION ASSOCIATION,

Alan J. Karcher as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio as President of the New Jersey Senate, the New Jersey Senate, Defendant Intervenors,

Appellants.

(D.C. Civil No. 83-0089)

On Appeal From The United States District Court
For The District of New Jersey—Newark

Present: GIBBONS and BECKER, *Circuit Judges* and KATZ, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel October 26, 1984, and reargued August 13, 1985.

On consideration where of, it is now here ordered and adjudged by the Court that the judgments of the said District Court entered November 15, 1983, appealed at No. 83-5890 and the order entered by the said District

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* Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix D

Court entered January 30, 1984, appealed at No. 84-5126 be and the same is hereby affirmed insofar as the appeal at No. 83-5890. The appeal at 84-5126 is dismissed. Costs taxed against appellants.

ATTEST:

SALLY MRVOS
Clerk

December 24, 1985

Certified as a true copy and issued in lieu
of a formal mandate on January 15, 1986.

Test:

BETTY J. ROBINSON
Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

APPENDIX E

Notice of Appeal to the Supreme Court of the United States and Proof of Service

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 83-5890 and 84-5126

JEFFREY MAY, Individually, et als.,

Plaintiffs-Appellees,

v.

SAUL COOPERMAN, COMMISSIONER OF THE DEPARTMENT OF EDUCATION, et als.,

Defendants,

ALAN J. KARCHER as Speaker of the New Jersey GENERAL ASSEMBLY, et als.,

Defendants-Intervenors-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Alan J. Karcher, as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio, as President of

the New Jersey Senate and the New Jersey Senate, defendants-intervenors-appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Third Circuit entered in this action on December 24, 1985, affirming the judgment entered in this action by the United States District Court for the District of New Jersey.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

HANNOCH WEISMAN, P.C.
Attorneys for Defendants-Intervenors-Appellants, Alan J. Karcher as Speaker of the New Jersey General Assembly; the New Jersey General Assembly; Carmen A. Orechio, as President of the New Jersey Senate and the New Jersey Senate
By: WILLIAM W. ROBERTSON
A Member of the Firm

DATED: March 19, 1986

Appendix E

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 83-5890 and 84-5126

JEFFREY MAY, Individually, et als.,

Plaintiffs-Appellees,

v.

SAUL COOPERMAN, COMMISSIONER OF THE DEPARTMENT OF EDUCATION, et als.,

Defendants,

ALAN J. KARCHER as Speaker of the New Jersey GENERAL ASSEMBLY, et als.,

Defendants-Intervenors-Appellants.

PROOF OF SERVICE

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

I, JEAN L. BELLINO, of full age, being duly sworn, according to law, upon my oath, depose and say:

1. I am employed by Hannoch Weisman, P.C., attorneys for appellants in this cause.

Appendix E

2. I did on Wednesday, March 19, 1986, cause to be hand delivered an original and one copy of a Notice of Appeal To The Supreme Court of the United States, together with an original and one copy of proof of service to Sally Mrvos, Clerk, United States Court of Appeals for the Third Circuit, 21400 United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania.

3. I did on Wednesday, March 19, 1986, serve, by first class mail, two copies of a Notice of Appeal To The Supreme Court Of The United States, together with a copy of a proof of service upon the following:

Norman L. Cantor, Esq.
Richard M. Altman, Esq.
Ann McHugh, Esq.
Pellettieri, Rabstein and Altman
13 West Front Street
Post Office Box 630
Trenton, New Jersey 08604-0630

Jack D. Novik, Esq.
American Civil Liberties Union
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New York, New York 10026
Attorneys for Appellees

Alfred A. Ramey, Jr.
Deputy Attorney General
Department of Law & Public Safety
Law Division
CN 11L, Justice Complex
Trenton, New Jersey 08625

JEAN L. BELLINO

NOTARIZED

APPENDIX F

Assembly Bill No. 1064

ASSEMBLY, No. 1064

STATE OF NEW JERSEY

INTRODUCED MARCH 8, 1982

By Assemblymen ZANGARI, PATERNITI, HERMAN, Assemblywoman PERUN, Assemblymen DEVERIN, OTLOWSKI, PELLY, HENDRICKSON, COWAN, JANISZEWSKI, NAPLES, Assemblywoman COSTA, Assemblymen PELLECCHIA, GIRGENTI, RILEY, MARSELLA, DORIA, WATSON, Assemblywoman GARVIN, Assemblymen BOCCHINI, PATERO, DOYLE, KARCHER, MATTHEWS, CHARLES, BRYANT, PANKOK, VAN WAGNER, THOMPSON, VISOTCKY, BROWN, JACKMAN, FLYNN, BENNETT, T. GALLO, SHUSTED, CHINNICI, ROCCO, SCHUBER, KOSCO, MARKERT, Assemblywoman WRIGHT, Assemblymen FRANKS, ROD, MUZIANI, MEYER, HAINES, WOLF, KAVANAUGH, SMITH, PALAIA, MILLER, KELLY, GORMLEY and LITTELL

Referred to Committee on Education

AN ACT to allow students of public schools to participate in a 1 minute period of silence before the opening of each school day and supplementing chapter 36 of Title 18A of the New Jersey Statutes.

Appendix F

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

2. This act shall take effect immediately.

STATEMENT

This bill allows each student to participate in a 1 minute period of voluntary silence to be used solely at the discretion of the individual student.